No. 05-88

JUL 14 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

CORNELIUS COOPER, *et al.*,

Petitioners,

v.

SOUTHERN COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX VOLUME I, PAGES 1a to 198a

MICHAEL B. TERRY
Counsel of Record
JOSHUA F. THORPE
STEVEN J. ROSENWASSER
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree St., NW
Atlanta, Georgia 30309
(404) 881-4100

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Does Rule 23 require plaintiffs to "convince the court" of the existence of a pattern or practice of discrimination and to "establish" discrimination before a class may be certified, and can the court reject admissible statistical reports in that analysis? Should the denial of class certification in this case be reversed?

II. Is class certification in a Title VII action barred if plaintiffs seek only equitable relief? Should the denial of Petitioners' alternative request for certification of an equitable relief-only class in this case be reversed?

III. What is required to characterize a case as a mixed-motive case at summary judgment for purposes of the application of the burden-shifting analysis of *Desert Palace v. Costa*, 539 U.S. 90 (2003), and if this case is not a mixed-motive case, does *Desert Palace* apply beyond mixed-motive cases? Should the grant of summary judgment in this case be reversed?

LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners Cornelius Cooper, Michael Edwards, Charcella Green, Patricia Harris, Sarah Jean Harris, Irene McCullers and Carolyn Wilson were plaintiffs and appellants in the proceedings below.

Respondents Southern Company, Southern Company Services, Inc., Southern Company Energy Solutions, Inc. and Georgia Power Company, Inc. were defendants and appellees below.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioners state as follows:

Southern Company is a publicly traded Delaware corporation that is domesticated under the laws of Georgia and that maintains its corporate headquarters in Atlanta, Georgia. Southern Company Services, Inc., Southern Company Energy Solutions, Inc., and Georgia Power Company, Inc. are subsidiaries of Southern Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT	ii
OPINIONS BELOW	3
JURISDICTION	3
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. The Opinion of the Eleventh Circuit disregards the holdings of this Court in *Eisen* and *Bazemore* and conflicts with other Circuit Courts	7
1. *Eisen* precludes a requirement that plaintiffs' evidence "convince the court" that discrimination exists at the class certification stage	8
a. The Eleventh Circuit has decided this important federal question in a way that conflicts with *Eisen*	9
b. The Eleventh Circuit has decided this important federal question in a way that conflicts with other circuits	10
2. *Bazemore* prohibits the weighing of expert reports and the omitted variable analysis in which the Eleventh Circuit engaged	11
a. The Eleventh Circuit has decided this important federal question in a way that conflicts with *Bazemore*	11

TABLE OF CONTENTS – Continued

Page

b. The Eleventh Circuit has decided this important federal question in a way that conflicts with other circuits 14

3. The Eleventh Circuit applies different class certification and summary judgment standards to discrimination cases than to other types of cases 18

II. The "Catch-22" – Petitioners should have been allowed to pursue an equitable relief-only class 22

III. The Lower Courts are in disarray over how (or even whether) to apply *Desert Palace* at the summary judgment stage 24

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Allison v. Citgo, 151 F.3d 402 (5th Cir. 1998) 22

Bazemore v. Friday, 478 U.S. 385 (1986) ..... *passim*

Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978) 23

Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2d Cir. 1999) 10, 15, 16

Chapman v. AI Transp., 229 F.3d 1012 (11th Cir. 2000) 21

Contractors Ass'n v. City of Philadelphia, 6 F.3d 990 (3d Cir. 1993) 16

Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984) 23

Costa v. Desert Palace, 299 F.3d 838 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003) 26

Cotton v. Hutto, 577 F.2d 453 (8th Cir. 1978) 23

Crawford-El v. Britton, 523 U.S. 574 (1998) 20

Crowder v. Lash, 687 F.2d 996 (7th Cir. 1982) 23

Currier v. United Techs. Corp., 393 F.3d 246 (1st Cir. 2004) 15

Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987 (D. Minn. 2003) 29

Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639 (4th Cir. 2002) 20

Desert Palace v Costa, 539 U.S. 90, 123 S.Ct. 2148, 156 L. Ed. 2d 84 (2003) 24, 25, 26, 27, 28, 29

Dicker v. Allstate Life Ins. Co., No. 89C4982, 1990 U.S. Dist. LEXIS 8586 (N.D. Ill. July 11, 1990) 11

TABLE OF AUTHORITIES – Continued

Page

Doctor v. Seaboard C.L. R. Co., 540 F.2d 699 (4th Cir. 1976) 10

EEOC v. Gen. Tel. Co., 885 F.2d 575 (9th Cir. 1989) 17

EEOC v. Minn. Beef Indus., Inc., No. Civ. 02-810DSDSRN, 2003 WL 22956445 (D. Minn. Dec. 11, 2003) 29

EEOC v. Venator Group, 99 Civ. 4758, 2002 U.S. Dist. LEXIS 1724 (S.D. N.Y. Feb. 5, 2002) 5

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) ....*passim*

Fortner v. Thomas, 983 F.2d 1024 (11th Cir. 1993) 23

Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994) 21

George Lussier Entrs. v. Subaru of New Eng., Inc., 2001 DNH 143 (D.N.H. 2001) 10

Hemmings v. Tidyman's Inc., 285 F.3d 1174 (9th Cir. 2002) 15

Herron v. Beck, 693 F.2d 125 (11th Cir. 1982) 23

Hill v. Lockheed Martin Logistics Mgmt., 354 F.3d 277 (4th Cir. 2004) 29

Hudson v. Delta Air Lines, 90 F.3d 451 (11th Cir. 1996) 19

In re Healthsouth Corp. Sec. Litig., 213 F.R.D. 447 (N.D. Ala. 2003) 19

In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001) 10, 14, 16

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 1

Jahn v. ORCR, Inc., 92 P.3d 984 (Colo. 2004) 23

TABLE OF AUTHORITIES – Continued

Page

Jones v. N.Y. City Health & Hosps. Corp., 102 Fed. Appx. 223 (2d Cir. 2004) 28

Jones-Bey v. Caso, 535 F.2d 1360 (2d Cir. 1976) 23

Kanawha & M. R. Co. v. Kerse, 239 U.S. 576 (1916) 21

Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718 (11th Cir. 1987) 19

Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004), *cert. denied*, 125 S.Ct. 877 (2005) 19

Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332 (11th Cir. 1984) 17

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 18

Lemon v. International Union of Operating Engineers Local No. 139, 216 F.3d 577 (7th Cir. 2000) 22

Love v. Turlington, 733 F.2d 1562 (11th Cir. 1984) 19

McGinest v. GTE Serv. Corp., 360 F.3d 1103 (9th Cir. 2004) 29

Mereish v. Walker, 359 F.3d 330 (4th Cir. 2004) 28

Miller v. Mackey Int'l, Inc., 452 F.2d 424 (5th Cir. 1971) 19

Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003) 22

Murray v. UFCR, Local 400, 100 Fed. Appx. 165 (4th Cir. 2004) 29

Nelson v. United States Steel Corp., 709 F.2d 675 (11th Cir. 1983) 18

Norris v. Slothouber, 718 F.2d 1116 (D.C. Cir. 1983) 22

TABLE OF AUTHORITIES – Continued

Page

Penson v. Terminal Transp. Co., 634 F.2d 989 (5th Cir. 1981) 23

Phillips v. Cohen, 400 F.3d 388 (6th Cir. 2005) 15

Prado-Steiman v. Bush, 221 F.3d 1266 (11th Cir. 2000) 17

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 20

Raad v. Fairbanks N. Star Borough, 323 F.3d 1185 (9th Cir. 2003) 20

Rachid v. Jack in the Box, Inc., 376 F.3d 305 (5th Cir. 2004) 29

Robinson v. Metro-North Commuter R.R., 267 F.3d 147 (2d Cir. 2001) 18, 22

Rowland v. Am. Gen. Fin., Inc., 340 F.3d 187 (4th Cir. 2003) 28

Shores v. Publix Supermarkets, Inc., No. 95-1162, 1996 WL407850 (M.D. Fla. Mar. 12, 1996) 16

Smith v. Chrysler Corp., 155 F.3d 799 (6th Cir. 1998) 21

Sobel v. Yeshiva Univ., 839 F.2d 18 (2d Cir. 1988) 16

Spears v. Johnson, 859 F.2d 853 (11th Cir. 1988) 23

Staton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003) 17

Stegall v. Citadel Broad. Co., 350 F.3d 1061 (9th Cir. 2003) 28

Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002) 18

Tyler v. Union Oil Co., 304 F.3d 379 (5th Cir. 2002) 14

United States v. Pasadena Indep Sch. Dist., No. H-83-5107, 1987 U.S. Dist. LEXIS 16912 (S.D. Tex. Apr. 18, 1987) 5

TABLE OF AUTHORITIES – Continued

Page

Webb v. Westinghouse Electric Corp., 78 F.R.D. 645 (E.D. Pa. 1978) 11

Wilson v. Commer. Fed. Mortg. Corp., No. 98-J-0184, 2000 U.S. Dist. LEXIS 20270 (N.D. Ala. Feb. 29, 2000) 10

OTHER AUTHORITIES

Jaclyn Borcherding, *Deserting McDonnell Douglas?, Desert Palace, Inc. v. Costa*, 57 Baylor L. Rev. 243, 254 (2005) 29

William R. Corbett, *An Allegory Of The Cave and The Desert Palace*, 41 Hous. L. Rev. 1549, 1550 (2005) 25

Adv. Comm. Notes, 1966 Amendments to Fed. R. Civ. P. 23, 42 U.S.C. § 1981 23

42 U.S.C. § 2000e-2 ..... 25, 30

42 U.S.C. § 2000e-5 ..... 26, 28

PETITION FOR A WRIT OF CERTIORARI

This petition presents important questions about the requirements for obtaining certification of a class raising claims of systemic discrimination under Title VII and Section 1981. The Eleventh Circuit held that plaintiffs must prove the existence of a pattern or practice of discrimination to obtain certification of such a class. The Eleventh Circuit's class certification ruling ignores the plain language of Rule 23, departs from the precedent of this Court, and conflicts with decisions of the Second and Ninth Circuits.

Petitioners, seven black employees of Respondent Southern Company and its subsidiaries, sought to challenge, on behalf of a class of about 2,400, the racially disparate treatment and impact caused by Respondents' common policies for awarding pay and promotions. Petitioners submitted the following evidence in support of their request for class certification:

(1) admissible statistical regression analyses by a qualified expert finding statistically significant deviations in pay and promotions between similarly-situated whites and blacks;

(2) Respondents' own internal reports finding, *inter alia*, that whites are paid, on average, 20.7% more than blacks and that blacks receive statistically significantly fewer promotions;

(3) 111 affidavits in which prospective class members recounted specific incidents of discriminatory conduct;

(4) audits from the U.S. Department of Labor finding numerous instances of discrimination against black employees in the areas of pay and promotions; and

(5) evidence of explicit racial hostility promulgated and tolerated by management, including numerous hangman's nooses, epithets, racist cartoons and KKK references, to bring "the cold numbers convincingly to life." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977).

The district court found that Respondents maintain common personnel policies that apply to pay and promotion decisions affecting a sufficiently numerous class of adequately represented black employees, but denied class certification because Petitioners had not "*convinced*" the court that the proffered evidence "*established*" a pattern or practice of discrimination. The district court subsequently granted summary judgment against each Petitioner's claims of systemic and individual discrimination. The Eleventh Circuit affirmed those rulings in every respect.

The evidence Petitioners offered was more than sufficient to raise common questions and to demonstrate the typicality of Petitioners' claims, *i.e.*, to satisfy Petitioners' burden under Rule 23. Yet, the district court and the Eleventh Circuit expressly denied class certification on the basis of their views of the substantive merits of the evidence, thus imposing a new and unjustified requirement that plaintiffs *prove* their case to a court to obtain class certification.

Even if Petitioners had overcome the Eleventh Circuit's erroneous evidentiary hurdle, the Court further imposed a "Catch 22" that effectively precludes certification of *any* class claims of intentional discrimination. The Court ruled, on the one hand, that if plaintiffs seek damages, certification is barred because individual issues relating thereto predominate. But, on the other hand, if plaintiffs do not seek damages, they are inadequate for failing to raise all of the class' claims.

The Eleventh Circuit's affirmance occurred over the vehement opposition of the United States Equal Employment Opportunity Commission ("EEOC"), which appeared both by brief and in oral argument to urge reversal of the district court's class certification and summary judgment holdings. The brief of the United States EEOC is included in the Appendix at Pet. App. 379a-412a.

The Eleventh Circuit has erected procedural and evidentiary hurdles that effectively foreclose the ability of employees to collectively challenge common policies or

practices that result in a pattern or practice of discrimination or have a disparate impact. Because the rulings in this case seriously threaten to curtail the promise of equal employment opportunity Title VII and Section 1981 were meant to secure, certiorari should be granted.

OPINIONS BELOW

The Eleventh Circuit's opinion (Pet. App. 1a-90a) is reported at 390 F.3d 695. The district court opinions granting motions for summary judgment are reported at 260 F. Supp. 2d 1352 (Pet. App. 231a-262a); 260 F. Supp. 2d 1258 (Pet. App. 164a-198a); 260 F. Supp. 2d 1317 (Pet. App. 90a-117a); 260 F. Supp. 2d 1295 (Pet. App. 263a-280a); 260 F. Supp. 2d 1278 (Pet. App. 118a-144a); 260 F. Supp. 2d 1305 (Pet. App. 145a-163a); 260 F. Supp. 2d 1334 (Pet. App. 199a-230a); and 213 F.R.D. 683 (Pet. App. 281a-292a). The district court opinion denying class certification is reported at 205 F.R.D. 596 (Pet. App. 293a-377a).

JURISDICTION

The Eleventh Circuit entered its judgment on November 10, 2004. The Eleventh Circuit denied a timely motion for reconsideration on April 15, 2005. (Pet. App. 378a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

The text of the relevant constitutional, statutory, and regulatory provisions are reproduced in the appendix. Pet. App. 413a.

STATEMENT OF THE CASE

The Southern Company and several of its subsidiaries (collectively "SoCo") utilize a common human resources system and operate under common pay and promotion policies, which apply to all members of the proposed class.

See R141 at 10-17 (discussing common policies and practices and discretion within each). Although SoCo has multiple facilities, the district court found that the policies and practices Petitioners challenge apply Southern Company-wide: "**Defendants utilize common compensation and promotions policies promulgated and administered by Defendant SCS.**" Pet. App. 300a (emphasis added); *id.* at Pet. App. 298a ("Defendant [SCS] has contracted with TSC and each of its subsidiaries to furnish human resources and EEO functions for them."). Petitioners allege, *inter alia*, that SoCo's common pay and promotion policies, which give managers unfettered discretion to make subjective, non-job-related decisions, foster a pattern and practice of discrimination or have a disparate impact on black employees, in violation of Title VII and 42 U.S.C. § 1981. Petitioners' allegations pertain to discrimination in pay and promotion only.

Petitioners submitted overwhelming common proof of a pattern or practice of discrimination. First, SoCo's own former head of Human Resources and EEO testified:

> During my tenure at Southern Company, the company was aware of significant **system-wide** problems in its affirmative action and diversity policies and practices. For example, in my position, **I received reports showing there were statistically significant differences between the promotion rates of African-Americans relative to Caucasians.**

R141, Ex. A ¶ 6D (emphasis added).

Second, SoCo's own internal analyses found that **blacks receive** (1) **on average, 20.7% lower salaries than whites**; (2) on average, 4.5% lower annual incentives than whites; and (3) statistically significantly fewer promotions than whites. R119, Exs. 12 (at 237, 240-41), 29, 57, 86.

Third, a Department of Labor audit concluded that at SoCo "underrepresentation of minorities . . . exists in several key areas," and that "[GPC] failed to ensure that

positions held by minorities . . . are at salary levels comparable to similar positions held by non-minority . . . peers." *Id.*, Ex. 14 at I7537, I7534.

Fourth, Petitioners submitted class-wide evidence of **statistically significant disparities** in the pay and promotion of black employees versus similarly qualified white employees. R119, Ex. 1. Petitioners' expert, Dr. Janice Madden of the University of Pennsylvania,[1] ran multiple regression analyses that controlled for numerous variables and found:

> **African American employees . . . are significantly less likely to be selected for promotion** between December 31, 1996 and December 11, 1999. . . . African-American employees are expected to have had 14.1% more promotions than they actually received, were a racially neutral selection process used to select employees. . . . The probability that a racially neutral promotion process could have generated this racial disparity is less than 3 in 100 thousand (.00002492)." *Id.*, Ex. 1 at 2 & Table 1 (emphasis added).

Significantly, Dr. Madden found that controlling for experience and education "increases the magnitude of the estimated promotional disadvantage of African-Americans," meaning that the shortfall of 14.1% is "likely an underestimate of the true shortfall." *Id.*, Ex. 1 at 14-15 & Tables 3-4.

Dr. Madden found even greater disparities in pay: "[T]he awarding of compensation at Southern is not

---

[1] Dr. Madden has been used as a statistical expert in discrimination matters by, *inter alia*, the United States (*United States v. Pasadena Indep. Sch. Dist.*, No. H-83-5107, 1987 U.S. Dist. LEXIS 16912 (S.D. Tex. Apr. 18, 1987) (Madden's statistical analysis established a *prima facie* case for plaintiff United States)) and the EEOC (*EEOC v. Venator Group*, 99 Civ. 4758, 2002 U.S. Dist. LEXIS 1724 (S.D. N.Y. Feb. 5, 2002) (denying *Daubert* motion as to Madden's analysis for plaintiff EEOC)).

racially neutral. For each year from 1995 through 1999, **African Americans receive significantly lower levels of compensation ... than do Caucasian employees" even when comparing employees with the same education, tenure at the company and job grade.** "The average percentage wage differentials by race were even greater when the effects of the racially-tainted salary grades are removed," ranging from 18.79% to 20.33%. "[T]he wage differences by race for each year massively exceeds the two standard deviations required to dismiss chance as the reason for the race differences." *Id.*, Ex. 1 at 2-4 & Tables 5-9 (emphasis added). "The probability that a racially neutral process could have generated the[] differentials is less than .0000000000026 or 26 in 10,000,000,000,000." *Id.*, Ex. 1 at 20.

Fifth, Petitioners submitted evidence of racial animus that the United States EEOC described as follows:

> [P]hotographs and documentary proof, generated in 2000, of at least 13 nooses displayed in eight GPC plants, some over a period of years; a compendium of racially offensive "jokes" posted on bulletin boards in company facilities; a "KKK cartoon" placed in employee mailboxes; a photograph of a hat with a racial epithet worn in the workplace; and testimonial accounts by numerous black employees of racially offensive slurs, "jokes," epithets, and harassment at work. Finally, 111 prospective class members signed affidavits recounting instances of alleged racial discrimination during their employment at SoCo. Pet. App. 394a.

Petitioners sought class certification on several *alternative* bases, including certification of claims solely for injunctive relief under Rule 23(b)(2), certification of claims for injunctive relief and backpay under (b)(2), and certification of claims for injunctive relief, backpay and damages under (b)(2) and/or (b)(3). R116 at 45; R141 at 24.

Holding that the evidence did not "convince the court" that a pattern and practice of discrimination existed, the district court denied Petitioners' Motion for Class Certification. The district court also granted summary judgment on every individual claim asserted by the Petitioners, holding, *inter alia*, that in the absence of "direct" evidence of discrimination, Petitioners had the burden to disprove each and every non-discriminatory motive proffered by Respondents. The Eleventh Circuit affirmed in all respects.

REASONS FOR GRANTING THE WRIT

I. The Opinion of the Eleventh Circuit disregards the holdings of this Court in *Eisen* and *Bazemore* and conflicts with other Circuit Courts

Requiring plaintiffs "to convince the Court" of the merits of their case at the class certification stage flatly contradicts Rule 23 and the holding of this Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974): "[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* That is precisely the "authority" the district court and Eleventh Circuit exercised in this case.

Weighing the relative merits of competing expert reports at the class certification stage and holding that Rule 23 is not satisfied based on a finding that an admissible, methodologically valid regression analysis does not "convince the Court" that discrimination exists violates *Bazemore v. Friday*, 478 U.S. 385 (1986), as well as *Eisen*. This violation is particularly clear on this record, where (a) Petitioners' expert report accounted for every variable described in *Bazemore* and more; (b) Respondents submitted no evidence that including the "omitted" variables would eliminate the statistically significant disparities found in Petitioners' expert report; (c) the report in fact included most of the additional variables the district court and the panel claimed were omitted; (d) other "omitted"

variables were subjective factors as to which no statistics were maintained; and, (e) the district court denied Petitioners' request for an evidentiary hearing on class certification. It was for a jury, not the court, to resolve the common questions posed by Petitioners' evidence.

1. *Eisen* precludes a requirement that plaintiffs' evidence "convince the court" that discrimination exists at the class certification stage

The district court here expressly denied class certification because Petitioners' evidence did not "convince the Court" that Respondents had engaged in a pattern and practice of race discrimination, *i.e.*, that Petitioners had proved their case. Pet. App. 366a ("Even when Plaintiffs' pattern and practice evidence is considered as a whole, however, it is not enough to *convince the Court* that race discrimination is Defendants' 'standard operating procedure' as defined by *Teamsters*.") (emphasis added). The district court expressly determined whether Petitioners had demonstrated commonality based on its perception of the strength of Petitioners' evidence relative to its perception of the strength of Respondents' evidence: "Plaintiffs assert that the conclusions of Dr. Madden prove that Defendants' collective policies have adversely impacted African-American employees of Defendants as to promotions and compensation. Therefore, *it is important to focus on the* ***relative strength and quality of that evidence*** *to determine if it is strong enough to provide the element of commonality* needed for class certification." Pet. App. 327a (emphasis added). The court held that "the extent of adverse outcome is not *proven with convincing force* by the expert testimony. . . . " Pet. App. 367a (emphasis added).

The district court cited no authority that permits a court to rule on the strength of a plaintiff's evidence in ruling on a motion for class certification, nor any case requiring plaintiffs to *prove* the existence of discrimination to have a class certified.

Nevertheless, the Eleventh Circuit expressly endorsed the district court's approach of deciding the issue of class certification by deciding the ***merits*** issue of whether plaintiffs' evidence ***proves*** a pattern and practice of discrimination. The Opinion states, "[t]hus, it was plainly necessary for the district court to evaluate the statistical evidence the plaintiffs submitted in order to determine whether it ***established*** the discrimination of which plaintiffs complained." Pet App. 30a (emphasis added).[2] The Eleventh Circuit went on to add "we are persuaded that the district court did not err in *any* of its determinations, and, accordingly, affirm its judgments in *all* respects." (emphasis added). Like the district court, the panel cites no authority for the proposition that a court may decide a motion for class certification by deciding whether the proffered evidence proves the plaintiffs' case. That proposition conflicts with *Eisen* and its progeny and creates a circuit split.

a. The Eleventh Circuit has decided this important federal question in a way that conflicts with *Eisen*

As noted above, this Court's opinion in *Eisen* prohibits a district court from denying class certification based on a ***merits*** ruling that the evidence does not prove the plaintiff's case. The Opinion attempts to distinguish *Eisen* by stating, "[t]hat a trial court [makes an informed assessment of the parties' evidence] does not mean that it has erroneously 'reached the merits' of the litigation." Pet. App. 23a. That attempted distinction ignores the fact that the district court did not merely assess the existence or admissibility of the evidence here; it expressly ***ruled on the merits*** of the evidence. There is no precedent allowing

[2] Pet. App. 37a ("the district court did not abuse its discretion in determining that the statistical and anecdotal evidence submitted by the plaintiffs did not ***establish*** pattern and practice discrimination common to the class or a common disparate impact") (emphasis added).

a district court to do such a thing; to the contrary, *Eisen* forbids it.

b. The Eleventh Circuit has decided this important federal question in a way that conflicts with other circuits

Other circuits interpret *Eisen* differently than the Eleventh Circuit. For example, the Second Circuit has held that "[t]hough [defendant's] critique of the Class Plaintiffs' evidence may prove fatal **at the merits stage**, the Class Plaintiffs need not demonstrate at this stage that they will prevail on the merits." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292-93 (2d Cir. 1999) (emphasis added); *see also In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) ("The district court correctly noted that its function at the class certification stage was not to determine whether plaintiffs had stated a cause of action or whether they would prevail on the merits, but rather whether they had shown, based on methodology that was not fatally flawed, that the requirements of Rule 23 were met. . . . The question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive"). The Fourth Circuit takes the same view as the Second. *See, e.g., Doctor v. Seaboard C. L. R. Co.*, 540 F.2d 699, 708-709 (4th Cir. 1976) ("it was entirely proper for the District Court . . . to identify the character or type (*but not the merits*) of each plaintiff's claim and then to determine whether there was a class to which such claim of the plaintiff was common and of which it was typical, sufficiently numerous to justify class certification.") (emphasis in original).[3]

---

[3] *George Lussier Enters. v. Subaru of New Eng., Inc.*, 2001 DNH 143 (D.N.H. 2001) ("the Supreme Court has held that I may not evaluate the merits of a case at the class certification stage"); *Wilson v. Commer. Fed. Mortg. Corp.*, No. 98-J-0184, 2000 U.S. Dist. LEXIS

(Continued on following page)

The Eleventh Circuit's ruling fundamentally changes the role of the district court in class certification in employment discrimination cases, allowing district courts to deny certification if plaintiffs' evidence does not "convince the court" that discrimination exists, and if the discrimination is not "proven with convincing force." The Opinion conflicts with the Second and Fourth Circuits and numerous district courts, and the issue needs resolution by this Court.

2. *Bazemore* prohibits the weighing of expert reports and the omitted variable analysis in which the Eleventh Circuit engaged

While *Eisen* establishes the general rule that the class certification decision cannot be based upon a preliminary ruling on the merits of the evidence, *Bazemore* specifically speaks to a type of evidence at issue here and in almost all class discrimination cases: expert statistical reports. The Eleventh Circuit's Opinion conflicts with this Court's decision in *Bazemore* and creates a clear split with the First, Second, Sixth and Ninth Circuits as to how *Bazemore* will be applied.

a. The Eleventh Circuit has decided this important federal question in a way that conflicts with *Bazemore*

As the Opinion recognizes, the district court did not question the admissibility of Dr. Madden's expert reports or the reliability of her methodology. Pet. 333a ("the Court concludes that while Madden's methodologies may be valid, the analysis has some limitations which undermine its usefulness in measuring whether Defendants'

20270 (N.D. Ala. Feb. 29, 2000) (*Eisen* does not allow "assaying the nature and quality of the evidence under the gossamer veil of a Rule 23 analysis."); *Dicker v. Allstate Life Ins. Co.*, No. 89C4982, 1990 U.S. Dist. LEXIS 8586 (N.D. Ill. July 11, 1990) (same); *Webb v. Westinghouse Electric Corp.*, 78 F.R.D. 645, 650-651 (E.D. Pa. 1978) (same).

employment practices are racially neutral"). Indeed, the multiple regression analyses Dr. Madden employed is a well-accepted manner for proving class-wide discrimination. *Bazemore* itself holds that where, as is the case here, a multiple regression analyses account for the major factors, it is sufficient to prove a pattern and practice of discrimination. *Id.* ("Importantly, it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case.").

Nonetheless, the district court and the Eleventh Circuit held that Petitioners' expert statistical report was insufficient to convince them that a pattern and practice of discrimination existed because of the alleged omission of certain variables. *Bazemore*, however, holds that such criticisms go to the ***weight***, not the admissibility, of a regression analysis:

> The Court of Appeals erred in stating that petitioners' regression analyses were 'unacceptable as evidence of discrimination,' because they did not include 'all measurable variables thought to have an effect on salary level.' The court's view of the evidentiary value of the regression analyses was plainly incorrect. **While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.'** Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.

478 U.S. at 400 (citation omitted) (emphasis added). Notably, the district court did not find Dr. Madden's reports to be "so incomplete as to be inadmissible as irrelevant." Instead, the Court concluded that it could disregard the reports when ruling on class certification because it was not "convinced" that they proved Petitioners' case. The lower court's decision to reject the reports as raising common questions as to the existence of a pattern

and practice of discrimination (both at the class and the summary judgment stage) directly conflicts with *Bazemore*.

The Opinion also conflicts with *Bazemore* by disregarding Dr. Madden's report based on speculation that some other variables *might* affect the analyses. Dr. Madden's regression analyses control for education (level of degree), experience (both time in work force and tenure at Southern Company), job function, subsidiary, and in certain analyses, job grade – more variables than this Court held were necessary in *Bazemore*. R141, Ex. B at 1-8. She excluded other variables as inappropriate or tainted and explained her analytical choices. *Id.* at 9-27. Moreover, Dr. Madden did, in fact, include most of the variables the district court found were omitted, demonstrating precisely why it is improper for a court to determine the merits of an expert report at class certification, without hearing or other opportunity to probe the evidence.[4] Dr. Madden's complex regression analyses, accepted by numerous courts, are not remotely "bottom line" statistics and are precisely the type of statistics this Court held are sufficient to prove a pattern or practice of discrimination in *Bazemore*.

The Opinion's attempt to distinguish *Bazemore* in a footnote is erroneous. Footnote eleven states that

---

[4] The claim that "Madden's reports did not take into account the type or level of acquired skills of job applicants" is incorrect. Pet. App. 32a. First, the reports control for job grade. Under Respondents' common system, jobs are assigned grades according to the "knowledge, skills and responsibilities" needed to perform each job. R119, Ex. 69 at F796. Dr. Madden thus accounted for differences in skill levels when she accounted for job grade. Second, Dr. Madden controlled for job function at hire, which examines "the subject area in which human capital (such as education or work experience) has been accumulated." R141, Ex. 1, App. A. Respondents place each job into a particular function, such as Engineering Services, Accounting, Administration, Customer Services, Information Systems, Human Resources, Marketing and Security. *Id.* As Dr. Madden explained, job function reflects "a business assessment by Southern of the field for which a worker's training and education qualify him or her," and is a better proxy for acquired skills than field of study, the variable Respondents advocate. *Id.* at 22-24.

Bazemore "did not hold that *any* statistical report, no matter how many critical variables were missing, should automatically present a jury question, indicating that there are 'some regressions so incomplete as to be inadmissible as irrelevant.'" Pet. App. 35a (emphasis added). ***But neither the district court nor the panel held that Dr. Madden's reports were "so incomplete as to be inadmissible as irrelevant."*** In fact, the opposite is true. Thus, *Bazemore* applies and mandates that a jury determine the weight to be accorded to the reports.

In a third attempt to distinguish *Bazemore*, the panel held that the "most important[]" distinction between this case and *Bazemore* is that the plaintiffs in *Bazemore* submitted independent analyses that confirmed their results and that the defendants' analysis reached substantially the same results. Pet. App. 34a. But, of course, nothing in *Bazemore* holds or suggests that the admissibility of regression analyses prepared by a plaintiff's expert turns on whether the opposing party's experts agree with the analyses. *See Tyler v. Union Oil Co.*, 304 F.3d 379, 393 (5th Cir. 2002) (under *Bazemore*, the fact that defendant's expert *disagrees* with statistical analysis "goes to the weight of Dr. Frank's testimony, not its admissibility."). Regardless, SoCo's own internal personnel found statistically significant disparities, thus providing the corroboration the Opinion wrongly requires. R119, Exs 12 (at 237, 240-241), 29, 57, 86.

b. The Eleventh Circuit has decided this important federal question in a way that conflicts with other circuits

Other circuits have interpreted *Bazemore* and *Eisen* as precluding the denial of certification or grant of summary judgment based on resolution of disputes raised by admissible expert reports. *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d at 135 ("A district court must ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law. However, a district court may not weigh conflicting expert evidence

or engage in 'statistical dueling' of experts.") (citations omitted). *See Phillips v. Cohen*, 400 F.3d 388, 400-01 (6th Cir. 2005) (court cannot resolve criticism of statistical analysis at summary judgment); *Currier v. United Techs. Corp.*, 393 F.3d 246, 252 (1st Cir. 2004) (that analysis "did not account for variables other than age and was not confined to similarly situated employees, in that there was no breakdown in terms of job, skills, or length of time served" was "a matter of weight rather than admissibility and thus properly a subject of argument and jury judgment."); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188-89 (9th Cir. 2002) (*Bazemore* required that regression controlling only for experience and seniority be submitted to jury for resolution of defense criticisms).

The Second Circuit's decision in *Caridad* exemplifies this approach:

> The District Court relied on the report of [defendant's] statistical expert [] to conclude that the Class Plaintiffs' statistics were inadequate because they failed to take into account the fact that [defendant's] positions have materially different rates of discipline and promotion. Though [defendant's] critique of the Class Plaintiffs' evidence may prove fatal **at the merits stage**, the Class Plaintiffs need not demonstrate at this stage that they will prevail on the merits. Accordingly, this sort of "statistical dueling" is not relevant to the certification determination. . . . The Class Plaintiffs submitted evidence that tends to establish that being Black has a statistically significant effect on an employee's likelihood of being promoted. . . . In conducting her analyses, the Class Plaintiffs' expert controlled for various factors that one would expect to be relevant to the likelihood of disciplinary action and promotion. These statistical disparities are not insignificant. More detailed statistics might be required to sustain the Plaintiffs' burden of persuasion, but this report, in conjunction with the anecdotal evidence, satisfies the Class

> Plaintiffs' burden of demonstrating commonality for purposes of class certification.

191 F.3d at 292-93 (citations omitted) (emphasis added).[6]

Here, the Opinion allows courts ruling on class certification to go beyond determining whether an expert report is admissible and methodologically reliable; to choose sides in a battle of experts; and to decide that Rule 23 is not satisfied based on a finding that an admissible, methodologically valid regression analysis does not provide sufficiently strong evidence of discrimination because the court speculates the analysis should have included additional variables. Pet. App. at 36a, 43a, 50a. The Opinion thus allows district courts to invade the province of the jury and to violate the Supreme Court's decision in *Bazemore*, creating a circuit split with at least the First, Second, Sixth and Ninth Circuits.

By rejecting Dr. Madden's reports based on ***speculation*** that omitted variables ***might*** have eliminated statistical disparities, the Opinion conflicts with *Bazemore* and Second, Third and Ninth Circuit law. *Bazemore*, 478 U.S. at 404 ("Respondents' strategy at trial was to declare simply that many factors go into making up an individual employee's salary; they made no attempt that we are aware of – statistical or otherwise – to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites."); *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990, 1007 (3d Cir. 1993) ("'[i]mplicit in the *Bazemore* holding is the principle that a mere conjecture or assertion . . . that some missing factor would explain the existing disparities . . . generally cannot defeat the inference of discrimination created by . . . statistics'") (citation omitted); *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 34

---

[6] *Visa Check*, 280 F.3d at 135; *Shores v. Publix Supermarkets, Inc.*, No. 95-1162, 1996 WL407850, at *7 (M.D. Fla. Mar. 12, 1996) ("The parties present a battle of experts in which Publix attacks several aspects of Plaintiffs' statistical analysis. . . . It is inappropriate for the Court to determine the ultimate correctness of either parties' contentions in the context of class certification.").

(2d Cir. 1988) ("We read *Bazemore* to require a defendant challenging the validity of a multiple regression analysis to make a showing that the factors it contends ought to have been included would weaken the [statistical] showing"); *EEOC v. Gen. Tel. Co.*, 885 F.2d 575, 583 (9th Cir. 1989) (same).

The district court and Eleventh Circuit's errors in disregarding *Eisen* and improperly applying *Bazemore* impacted all aspects of the class certification analysis, including the typicality analysis. Although the district court found that Petitioners satisfied typicality with respect to the vast majority of the class, it incorrectly found that the Petitioners' claims were not typical of a few subgroups. Pet. App. 324-26a. Had the district court properly considered Petitioners' expert reports and the fact that all class members asserted the same legal theory (*i.e.*, the same policy of discretionary, non-job-related decision-making for pay and promotions and the same pattern and practice of discrimination), it would have recognized that Petitioners satisfied the typicality requirement for *all* members of the class. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (holding in a *non-discrimination* case that "typicality is established if the claims or defenses of the class and the class representative arise from **the same** event or **pattern or practice** and are based on **the same legal theory**"); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) (same); *Staton v. Boeing Co.*, 327 F.3d 938, 958 (9th Cir. 2003) (typicality satisfied when plaintiffs allege that a common policy creates a pattern or practice of discrimination, and rejecting argument that a class representative is required for "each job category"). Indeed, on similar facts, the Second Circuit reversed a district court's finding that plaintiffs did not satisfy typicality, concluding that the district court's improper rejection of plaintiffs' multiple regression analyses showing a pattern or practice of discrimination was "central" to its erroneous rejection of typicality, and that the statistical report and anecdotal evidence demonstrated typicality arising out of common policy or practice of delegating discretion to managers.

Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 156 (2d Cir. 2001).

The improper rejection of the statistical evidence fatally impacted the summary judgment rulings as well as class certification. The district court and Eleventh Circuit affirmed that the summary judgment rulings depended on the rejection of the statistical evidence. Pet. App. 50-51a, 103-04a, 137a, 162-63a, 195a, 214-15a, 251a, 276-79a. Reversal of that rejection will require reversal of each summary judgment order.

3. The Eleventh Circuit applies different class certification and summary judgment standards to discrimination cases than to other types of cases

This Court has repeatedly prohibited disparate application of the Rules of Civil Procedure based upon the classification of the claim.[6] However, the Eleventh Circuit has developed a double standard for the application of Rule 23 that distinguishes and elevates the requirements for certification of discrimination actions from the requirements for certification of all other claims. For example, the Eleventh Circuit requires that discrimination plaintiffs present evidence at class certification that "convince[s] the court" that discrimination exists and that "establishes" discrimination to the Court's satisfaction as a precondition to certification. Pet. App. 30a, 37a, 366a. *See also Nelson v. United States Steel Corp.*, 709 F.2d 675, 679 (11th Cir. 1983) (discrimination case – plaintiff must not only *allege* a general policy of race discrimination but must produce "reliable evidence" of discrimination at the class certification stage).

---

[6] *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-513 (2002) (courts may not impose pleading requirements upon Title VII cases which differ from those imposed under the Rules of Civil Procedure on all types of cases); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (court cannot create differential procedural requirements for different classes of claims).

In other types of cases, however, the Eleventh Circuit respects *Eisen's* prohibition on ruling on the merits of evidence at the class certification stage. *See, e.g., Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 723 (11th Cir. 1987) (securities case – "the court's rejection of the fraud-on-the-market theory was based upon nothing other than the court's assessment of the plaintiffs' likelihood of success on the claims. This is an improper basis for deciding the propriety of a class action."); *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), *cert. denied*, 125 S.Ct. 877 (2005) (*allegation* of conspiracy sufficient to establish commonality in RICO case); *Hudson v. Delta Air Lines*, 90 F.3d 451, 457 (11th Cir. 1996) ("We stress initially that the merits of the plaintiffs' claims are not before us." (*citing Eisen*) (ERISA case)); *In re Healthsouth Corp. Sec. Litig.*, 213 F.R.D. 447, 452 (N.D. Ala. 2003) (securities case – same); *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424, 428 (5th Cir. 1971) (same). Thus, in the Eleventh Circuit, discrimination cases are treated differently under Rule 23 than other types of cases.[7]

Indeed, the decision on which the Eleventh Circuit relied to justify the district court's intrusion into the merits in this case is another Eleventh Circuit discrimination case – *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984). *Love* stated, in language quoted by the Eleventh Circuit in this case, that *Eisen's* prohibition on merits determination at class certification "should not be talismanically invoked." *Id.* The Eleventh Circuit has only followed this particular holding of *Love* in discrimination cases. *See, e.g., Kirkpatrick*, 827 F.2d at 723 (declining to apply *Love* to allow review of merits at class stage in securities case).

---

[7] The Eleventh Circuit itself appears to recognize that it treats discrimination cases differently. *Klay*, 382 F.3d at 1256-57 (explaining why court's affirmance of certification of RICO class is in "stark contrast" to its analysis in race discrimination cases).

This distinction between discrimination cases and other causes of action permeates Eleventh Circuit jurisprudence on merits as well as class-certification issues, including on such issues as the burden of proof and evidentiary presumptions. Examples from this case include:

a) The "Slap you in the Face" Heightened Burden of Proof – In cases alleging discrimination in promotion, plaintiffs often seek to demonstrate that the defendant's explanation for its promotion decision is mere pretext by presenting evidence that they were more qualified than the person who received the promotion at issue. In such cases, the Eleventh Circuit (along with the Fifth Circuit) holds (and held here) that a preponderance of the evidence is not sufficient and that a plaintiff "must adduce evidence that the disparity in qualifications is 'so apparent as virtually to **jump off the page and slap you in the face**.'" Pet. App. 62a (emphasis added). This heightened burden of proof is applied by the Eleventh Circuit **only** in discrimination cases – precisely the type of disparate application of the rules prohibited by this Court. *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 594 (1998) ("for the courts of appeals or this Court to change the burden of proof for an entire category of claims would stray far from the traditional limits on judicial authority.") The application of a heightened burden of proof in Title VII cases was specifically rejected by this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989) ("Conventional rules of civil litigation generally apply in Title VII cases, [citation omitted] and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence.").

Moreover, there is a circuit split on this precise issue. The "slap you in the face" standard has been rejected by the Fourth and Ninth Circuits. *See Raad v. Fairbanks N. Star Borough*, 323 F.3d 1185, 1194 (9th Cir. 2003); *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 648 (4th Cir. 2002).

b) The requirement to disprove all proffered non-nondiscriminatory reasons – Under the venerable

principal of ***falsus*** *in uno,* ***falsus*** *in omnibus*, evidence of a material misrepresentation will allow the ultimate finder of fact to disbelieve the remainder of the testimony of the witness. *See Kanawha & M. R. Co. v. Kerse*, 239 U.S. 576, 581 (1916). Yet, the Eleventh Circuit has adopted a different rule for discrimination cases, holding that if a defendant proffers multiple nondiscriminatory reasons for the challenged action, and, as here, plaintiff presents evidence that one (or even several) of the proffered reasons are blatantly false, summary judgment will still be granted to the defendant unless the plaintiff demonstrates that "each" of the proffered reasons is false. *Cooper*, 390 F.3d at 726. There is another Circuit split on this issue, with other circuits rejecting the requirement to disprove "each" proffered reason.[8] "[I]t is reasonable, where the showing of pretext as to one reason is sufficiently strong as to permit a jury to find that the employer (or its decision-maker) lacks all credibility, to conclude that summary judgment is inappropriate – even without a specific showing of pretext as to another reason." *Chapman v. AI Transp.*, 229 F.3d 1012, 1050 (11th Cir. 2000) (Birch, J. dissenting and collecting cases). The Eleventh Circuit applies this exception to *falsus in uno, falsus in omnibus* only in discrimination cases.

---

[8] *Fuentes v. Perskie*, 32 F.3d 759, 764-65 n.7 (3d Cir. 1994) ("the factfinder's rejection of some of the defendant's proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons, even if no evidence undermining those remaining rationales in particular is available."); *Smith v. Chrysler Corp.*, 155 F.3d 799, 809 (6th Cir. 1998) ("an employer's strategy of simply tossing out a number of reasons to support its employment action in the hope that one of them will 'stick' could easily backfire" such that "a multitude of suspicious explanations may itself suggest that the employer's investigatory process was so questionable that any application of the 'honest belief' rule is inappropriate.").

II. The "Catch-22" – Petitioners should have been allowed to pursue an equitable relief-only class

In this case, the Eleventh Circuit held that because Petitioners sought damages and not merely equitable relief, class certification under Rule 23(b)(2) was barred because individual issues relating to damages would always predominate in discrimination class actions seeking damages, adopting *Allison v. Citgo*, 151 F.3d 402 (5th Cir. 1998).[9] But Petitioners had also asked alternatively for an equitable relief only class. The Court then held that "to the extent the named plaintiffs were willing to forego class certification on damages in order to pursue injunctive relief . . . it is far from clear that the named plaintiffs would adequately represent the interests of the other putative class members." No other grounds were set forth for denying Petitioners' alternative request for certification only of claims for equitable relief.

This "Catch-22" analysis effectively eliminates class action discrimination cases in the Eleventh Circuit. That is, on the one hand, the Court held that if plaintiffs seek damages, certification is barred because individual issues relating thereto predominate. But, on the other hand, if plaintiffs do not seek damages, they are inadequate for failing to raise all of the class' claims (even though the Court held that class-wide damages claims are barred).

The Eleventh Circuit's inadequacy holding apparently rests on the premise that bringing injunctive relief only class claims would somehow preclude later damages claims by class members. The opinions of several circuits and this Court conflict with that holding. *See Norris v. Slothouber*, 718 F.2d 1116, 1117 (D.C. Cir. 1983) ("A suit for damages is not precluded by reason of the plaintiff's membership in a class for which no monetary relief is

---

[9] Other circuits disagree. *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001); *Lemon v. International Union of Operating Engineers Local No. 139*, 216 F.3d 577 (7th Cir. 2000); *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003).

sought."); *Bogard v. Cook*, 586 F.2d 399, 408-09 (5th Cir. 1978) (individual claims for damages are not part of the claim presented by an action for declaratory or injunctive relief under Civil Rule 23(b)(1) or (b)(2).); *Crowder v. Lash*, 687 F.2d 996, 1009 (7th Cir. 1982) (same); *Cotton v. Hutto*, 577 F.2d 453, 454 n.4 (8th Cir. 1978) (same); *Jones-Bey v. Caso*, 535 F.2d 1360, 1361-62 (2d Cir. 1976) (same); *Jahn v. ORCR, Inc.*, 92 P.3d 984, 985 (Colo. 2004) (same). *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984) (judgment in a class action determining that an employer did not engage in a pattern or practice of discrimination will not bar class members from bringing individual discrimination claims).

In addition to creating conflicts with numerous other circuits and failing to adhere to the precedent of this Court, the Eleventh Circuit's Catch-22 is another example of differential treatment of discrimination claims versus other types of claims. The Eleventh Circuit does not preclude subsequent damages claims as a result of membership in a class seeking injunctive relief outside the realm of employment discrimination. *See Fortner v. Thomas*, 983 F.2d 1024, 1031 (11th Cir. 1993) (prisoner's rights case) ("claim for monetary damages or other particularized relief is not barred if the class representative sought only declaratory and injunctive relief."); *Herron v. Beck*, 693 F.2d 125, 127 (11th Cir. 1982) ("the class representatives sought only declaratory and injunctive relief, not damages. Thus, the appellant's claim for damages would not be barred by the class action."); *Spears v. Johnson*, 859 F.2d 853, 855 (11th Cir. 1988) (same).

Actions seeking injunctive relief for class-wide discrimination fit squarely within Rule 23(b)(2), which is "intended primarily to facilitate civil rights class actions." *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 993 (5th Cir. 1981); Adv. Comm. Notes, 1966 Amendments to Fed. R. Civ. P. 23 ("actions in the civil-rights field where a party is charged with discriminating unlawfully against a class" are illustrative of (b)(2) class actions). Yet, under the Circuit's ruling, there could not be a class action only for injunctive relief to challenge an express policy or uniform

practice of denying all promotions to blacks or women, because prospective class members would have damages claims as well as claims for injunctive relief. This Court should prevent the Eleventh Circuit from effectively eliminating all employment discrimination class actions in the Circuit.

III. The Lower Courts are in disarray over how (or even whether) to apply *Desert Palace* at the summary judgment stage

This case presents important issues relating to the burden of proof in individual employment discrimination actions. Prior to *Desert Palace v. Costa*, 539 U.S. 90 (2003), cases were treated as mixed-motive cases if there were direct evidence of discrimination, and as single-motive cases if the evidence of discrimination was circumstantial. In *Desert Palace*, this Court held that, at least in mixed-motive cases, once a plaintiff presents even circumstantial evidence from which a reasonable jury could find that race was a motivating factor in the adverse employment action, a mixed-motive instruction was required, instructing the jury that if it believed race was a motivating factor, liability was established, and that the burden of proof then shifted to the defendant to prove that it would have taken the same action in the absence of the impermissible motivating factor to limit plaintiff's remedies. If circumstantial evidence that race was a motivating factor is sufficient to sustain a liability verdict at trial, it must be enough to survive summary judgment.

However, in *Desert Palace*, this Court reserved the question of whether the burden shifting framework that case created applies to single-motive cases. Without the prior method of distinguishing between mixed-motive and single-motive cases based on the type of evidence (direct or circumstantial), lower courts have reached conflicting and contradictory results in deciding whether or not to apply *Desert Palace* to particular cases. In this case, the Eleventh Circuit held that Petitioners' claims were not entitled to the application of *Desert Palace* because the case was

not a mixed-motive case, even though the facts presented were similar to those that other circuits have held fall within the rubric of a mixed-motive case and thus require application of *Desert Palace*. This case should be held to be a mixed-motive case in which burden shifting applies within the meaning of *Desert Palace*.

Should the Court here find that the claims are single-motive claims, then the question reserved in *Desert Palace* must be answered. Based on a logical reading of the statute, the answer should be to apply *Desert Palace* to all Title VII cases. Because the determination of the application of the *Desert Palace* rule will impact the burden of proof at summary judgment and trial in every Title VII case, it is important that guidance be provided to the lower courts:

> **[T]here is an issue of transcendent importance that demands imminent resolution. No issue is more crucial to the litigation of intentional discrimination cases than determining what effect the U.S. Supreme Court's 2003 decision in *Desert Palace, Inc. v. Costa* has on the pretext proof structure developed by the Court in *McDonnell Douglas Corp. v. Green*. . . . Litigants, lawyers, and judges need an answer to that question now.**

William R. Corbett, *An Allegory Of The Cave And The Desert Palace*, 41 Hous. L. Rev. 1549, 1550 (2005) (emphasis added).

In *Desert Palace*, this Court interpreted 42 U.S.C. § 2000e-2(m), which provides that "an unlawful employment practice is established when the complaining party demonstrates that race . . . was a motivating factor for any employment practice, even though other factors also motivated the practice." 539 U.S. at 94. This Court held that a violation of § 2000e-2(m) can be established through circumstantial as well as direct evidence, and that once a plaintiff presents even circumstantial evidence from which a reasonable jury could find that race was a motivating factor in the adverse employment action, the burden of

proof shifts to the defendant to prove an affirmative defense that it "would have taken the same action in the absence of the impermissible motivating factor." *Id.* at 100-01. This Court expressly overruled the "direct evidence" requirement relied upon by the district court here.

At summary judgment, Petitioners set forth a *prima facie* case (and more) through statistical and testimonial evidence of discriminatory intent and animus.[10] Respondents proffered alleged non-discriminatory motives for their conduct, but expressly pleaded that "[s]ome or all of the relief requested in the Complaint is barred because, even if Defendants were found to have considered any impermissible factors in any decisions or actions with respect to any of the Plaintiffs, (which Defendants deny), *Defendants would have taken the same action with regard to such person's employment regardless of any impermissible factors.*" R. 66-7 (emphasis added).[11] This was an invocation of the limited affirmative defense available "[o]n a claim in which an individual proves a violation under section 703(m) [42 USCS § 2000e-2(m)] and a respondent demonstrates that the *respondent would have taken the same action in the absence of the impermissible motivating factor.*" 42 U.S.C. § 2000e-5(g)(2)(B) (emphasis added).

In granting summary judgment as to all claims of the Petitioners, the district court held that because (in its judgment) Petitioners had proffered no "direct" evidence of discrimination,[12] this was not a mixed-motive case and

---

[10] As noted above, the improper rejection of the statistical evidence is sufficient to mandate reversal of the summary judgments.

[11] "[T]he terms single-motive and mixed-motive . . . primarily refer to the theory or theories by which the defendant opposes the plaintiff's claim of discrimination." *Costa v. Desert Palace*, 299 F.3d 838, 854 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

[12] Petitioners proffered ample evidence of racist jokes, racist graffiti, racially hostile remarks, and numerous hangman's nooses hung about the workplaces. *See, e.g.*, Pet. App. 188a. The District Court erroneously held that this was not direct evidence of discrimination. *Id.*

Petitioners were required to proceed under the *McDonnell Douglas* framework. *See, e.g.*, Pet. App. 128a. In other words, the district court applied the distinction between direct and circumstantial evidence that this Court expressly rejected in *Desert Palace*. As a result, the district court held that to avoid summary judgment, Petitioners had the burden to prove pretext as to each of the numerous nondiscriminatory motives proffered by Respondents (*see* Pet. App. 215a), rather than examining whether Petitioners had evidence that race was a motivating factor and imposing the burden upon Respondents to demonstrate that they would have taken the same action without regard to the impermissible factor. Six of the seven Petitioners (all but McCullers) lost at summary judgment based on the alleged failure to prove pretext as to each of Respondents' proffered non-discriminatory motives – a burden that Petitioners were not required to meet under *Desert Palace*.

Petitioners asked for the application of the rule set forth in *Desert Palace* that direct evidence was not required: "[t]he plaintiffs argue, however, that the *McDonnell Douglas* burden-shifting analysis applied to claims of employment discrimination was radically revised by the Supreme Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L. Ed. 2d 84 (2003)." Pet. App. 48a n.17. Petitioners contend that *Desert Palace* applies whenever there is evidence of alternative motives so that the finder of fact could believe either or both parties as to the defendant's motive. If the plaintiff proffers evidence that race played a role, and the defendant puts in evidence that the plaintiff had a bad attitude, the jury could believe either, or could believe that both factors played a role. The possibility that the finder of fact could believe both factors played a role is sufficient to justify a mixed-motive instruction under *Desert Palace* whether plaintiff's evidence is direct or circumstantial.

The Eleventh Circuit, however, rejected Petitioners' argument for the application of *Desert Palace* to the summary judgment rulings in this case, holding that (a)

this Court would not have *sub silentio* overruled or modified *McDonnell Douglas*; and, (b) *Desert Palace* applies only to mixed-motive cases (ignoring the evidence here of multiple permissible and impermissible motives and the Respondents' invocation of 42 U.S.C. § 2000e-5(g)(2)(B)). But, the only reason for the district court's holding that this was not a mixed-motive case was the absence of direct evidence. And, under the rule applied by other Circuits since *Desert Palace*, this clearly was a mixed-motive case.[13] The Eleventh Circuit's opinion thus adds to the confusing array of circuit and district court opinions trying to apply *Desert Palace* at the summary judgment stage.

Should this Court determine that this case is not a mixed-motive case, then this Court will be confronted with the issue expressly reserved in *Desert Palace* – "when, if ever, § 107 applies outside of the mixed-motive context." *Desert Palace*, at 91 n.1.

> **The judicial response to *Desert Palace* is in disarray**. Federal district courts, even within the same Circuit, as well as a few **circuit courts, have construed *Desert Palace* inconsistently in two ways**. First, the courts disagree over the application of *Desert Palace* at

---

[13] *Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187, 193 (4th Cir. 2003) (where plaintiff had evidence of discriminatory motive and defendant argued an entirely nondiscriminatory motive, case is a mixed-motive case); *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1072 (9th Cir. 2003) ("Since it is uncontroverted that Marathon has offered two reasons for firing Stegall, yet we hold that the record in this case would support a finding that Marathon had illegitimate motives, it is logical to examine the case as one involving 'mixed motives' "); *Jones v. N.Y. City Health & Hosps. Corp.*, 102 Fed. Appx. 223, 226-227 (2d Cir. 2004) (case is to be treated as a mixed-motive case "where a plaintiff presents 'sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice' "); *Mereish v. Walker*, 359 F.3d 330, 339 (4th Cir. 2004) ("plaintiffs can invoke the codified mixed-motive framework by putting forth any type of evidence – direct or circumstantial – which demonstrates that discriminatory animus was a motivating factor for an employment practice.").

> the summary judgment stage of Title VII litigation. **Specifically, the courts disagree on whether the case applies only to mixed-motive cases under Title VII or also to single-motive cases.**

Jaclyn Borcherding, *Deserting McDonnell Douglas?, Desert Palace, Inc. v. Costa*, 57 Baylor L. Rev. 243, 254 (2005) (emphasis added).

The impact of *Desert Palace* at summary judgment has provoked widely divergent views from the lower courts. *See Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004) (*Desert Palace* modified *McDonnell Douglas* summary judgment analysis so that at stage three, the plaintiff may prevail if it produces evidence sufficient to create a genuine issue of material fact either that the defendant's articulated reason was a pretext for discrimination **or** that the defendant's reason may be true but another motivating factor for the decision was discrimination); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 (9th Cir. 2004) (plaintiff may prevail at summary judgment by showing pretext "or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated" the defendant); *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 285 (4th Cir. 2004) (applying *Desert Palace* analysis at summary judgment as an alternative to *McDonnell Douglas*); *Murray v. UFCW, Local 400*, 100 Fed. Appx. 165, 175-76 (4th Cir. 2004) (same); *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987, 990 (D. Minn. 2003) (interpreting *Desert Palace* as an affirmation that Congress intended to abrogate *McDonnell Douglas* with the Civil Rights Act of 1991). *But see* (in addition to this case) *E.E.O.C. v. Minn. Beef Indus., Inc.*, No. Civ. 02-810 DSDSRN, 2003 WL 22956445, at * 2-3 (D. Minn. Dec. 11, 2003) (*Desert Palace* applies to jury instructions; but *McDonnell Douglas* continues to be the test at summary judgment).

By holding that Petitioners could avoid summary judgment only by establishing pretext as to each proffered nondiscriminatory motive and by refusing even to examine

whether Petitioners' evidence was sufficient for a jury to find that "a discriminatory reason more likely than not motivated" defendants, the Opinion conflicts with decisions of other circuits, this Court's decision in *Desert Palace*, and the plain language of 42 U.S.C. § 2000e-2(m). As courts and commentators have recognized, courts desperately need guidance as to what is required to qualify a case as a mixed-motive case after *Desert Palace* and whether there is a distinction between mixed-motive and single-motive cases in the application of *Desert Palace*.

CONCLUSION

This Petition should be granted to resolve circuit splits and to secure the rights afforded by the civil rights laws.

Respectfully submitted,

MICHAEL B. TERRY
Counsel of Record
JOSHUA F. THORPE
STEVEN J. ROSENWASSER
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree St., NW
Atlanta, Georgia 30309
(404) 881-4100

CORNELIUS COOPER, MICHAEL EDWARDS, et al., Plaintiffs-Appellants, versus SOUTHERN COMPANY, GEORGIA POWER COMPANY, et al., Defendants-Appellees.

No. 03-12230

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

390 F.3d 695; 2004 U.S. App. LEXIS 23495; 94 Fair Empl. Prac. Cas. (BNA) 1854; 18 Fla. L. Weekly Fed. C 11

November 10, 2004, Decided
November 10, 2004, Filed

OPINION BY: MARCUS

OPINION: MARCUS, Circuit Judge:

Cornelius Cooper and six other plaintiffs appeal from the district court's orders denying class certification in their employment discrimination suit and entering final summary judgment in favor of the defendants, the Southern Company, Georgia Power Company, Southern Company Services, Inc., and Southern Company Energy Solutions, Inc. Seven current or former employees[1] of the various defendants brought this putative class action, alleging violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 ("Section 1981"). The plaintiffs claimed discrimination in promotions and compensation, and sought declaratory and injunctive relief, back pay, and

---

[1] The plaintiffs/appellants are Cornelius Cooper, Michael Edwards, Charcella Green, Patricia Harris, Sarah Jean Harris, Irene McCullers, and Carolyn Wilson.

compensatory and punitive damages. After denying class certification, the district court entered seven separate orders of summary judgment in favor of the defendants.

After painstaking review of the record, as well as careful consideration of the briefs and oral argument, we conclude that the district court did not abuse its discretion in denying class certification, because the plaintiffs demonstrated neither that they had satisfied the commonality and typicality requirements of Federal Rule of Civil Procedure 23(a), nor that damages were incidental to equitable and declaratory relief or that common questions of law or fact predominated, as required under Federal Rule of Civil Procedure 23(b)(2) or (b)(3). In addition, we are persuaded by none of the plaintiffs' arguments regarding the individual summary judgment orders and, accordingly, affirm in all respects the judgments of the district court.

I.

The complex facts and procedural history underlying this appeal are these. Seven African-American past or present employees of the defendant companies filed suit on July 27, 2000, alleging that the Southern Company and several of its subsidiaries – Georgia Power Company, Southern Company Services, Inc. and Southern Company Energy Solutions, Inc. – unlawfully discriminated against their employees on account of race.[2] The plaintiffs alleged

[2] The plaintiffs subsequently amended their Complaint in August, 2000. After the defendants answered the Amended Complaint, and the district court granted permission to amend and supplement the Amended Complaint, the plaintiffs filed a Third Amended Complaint on December 11, 2000. Unless otherwise noted, throughout this opinion

(Continued on following page)

that the defendants discriminated against them in connection with promotion opportunities and performance evaluations, as well as in terms of compensation, and claimed that the defendants tolerated a racially hostile working environment. Notably, the plaintiffs sought to represent a Rule 23 class that they described in the following terms:

> All African-American persons employed by Southern Company's Corporate Office, Georgia Power Company, Southern Company Services, Inc. or Southern Company Energy Solutions, Inc., in the United States at any time from July, 1998 to the present, who are subject to the Defendants' employment, personnel and human resources policies and practices and who have been, continue to be, or may in the future be adversely affected by the Defendants' racially discriminatory employment policies and practices ("the Class").

Cooper v. Southern Co., 205 F.R.D. 596, 598-99 (N.D. Ga. 2001). At the time suit was filed, the proposed class included approximately 2,400 individuals residing in Georgia, Alabama, Florida, and Mississippi, and working at locations dispersed throughout the four states. The proposed class consisted of entry-level manual laborers and skilled professionals, among others, and encompassed exempt, non-exempt,[3] unionized and non-unionized workers.

---

references to the "Complaint" are to the plaintiffs' Third Amended Complaint.

[3] Non-exempt employees are covered by the requirements of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, including,

(Continued on following page)

In essence, the plaintiffs maintain that the various defendant companies share a common system for personnel decision-making, which constitutes a "common policy or practice" that is appropriately challenged on a class-wide basis. Specifically, plaintiffs say that there are "common promotion and compensation policies and practices, which give managers unfettered discretion to make subjective, non-job-related decisions." Appellants' Brief at 2. According to plaintiffs, these "common policies and practices . . . foster a pattern or practice of race discrimination or have a disparate impact on black employees," *id.*, and plaintiffs sought to redress the claimed wrongdoing in the form of a class action.

A.

The defendants include four companies that provide a wide range of energy-related products and services throughout the southeastern United States. The Southern Company ("TSC") is a holding company that itself has no employees, but which owns stock in the other defendant companies, all Southern Company subsidiaries. TSC is a Delaware corporation that is domesticated under the laws of Georgia and maintains its corporate headquarters in Atlanta, Georgia. In addition, TSC is the corporate parent of various other utility companies not directly involved in the lawsuit.

Georgia Power Company ("GPC") is the Southern Company's largest subsidiary, and provides electricity to approximately 1.9 million customers in 153 of Georgia's

---

for example, its overtime provisions. Exempt employees are not covered by the FLSA.

159 counties. GPC employs approximately 9,000 employees in the state of Georgia, some 44% of whom are covered by a collective bargaining agreement ("CBA") with the International Brotherhood of Electrical Workers ("IBEW"), Local No. 84. GPC's operations are extremely diversified, and its facilities, workforce, and management are dispersed across the entire state of Georgia. Certain functions within GPC are divided among different regions in the state, and widely divergent operating and management structures exist within different regions. Thus, for example, GPC's Customer Operations function across 16 regions that have very different workforces. The expansive and rural Southeast Region has very different characteristics with respect to technology, customer service, and distribution capacity than does the metropolitan Atlanta region, a dense and highly-populated area that includes numerous commercial clients.

Southern Company Energy Solutions ("SCES"), in turn, is a non-regulated, non-utility subsidiary of the Southern Company that develops for sale various energy-related products and services. SCES consults with commercial and industrial clients on energy efficiency, provides energy efficiency and environmental programs and services, and offers other services to commercial and residential customers. Most of the fewer than 300 employees employed by SCES are exempt employees whose compensation is determined by sales commissions; none of SCES's employees is a member of a union.

Finally, Southern Company Services ("SCS") provides the other defendants with human resources services and administers common compensation and promotion policies. SCS also provides various public relations and employee relations services to the other defendant companies. SCS

employs approximately 3,500 non-unionized employees who work primarily in Georgia and Alabama, although they also coordinate services in Mississippi, Florida, New York, and Washington, D.C.

The differences in management structures, working environments, and criteria for employment decisions vary substantially among the defendant companies. The promotion and compensation decisions affecting laborers involved in electrical power transmission and distribution, for example, take into account very different criteria than do decisions involving the professional and managerial ranks of the companies. Similarly, the more than 200 locations in which employees of the different defendants work are spread throughout a widely dispersed geographical area and encompass an extremely diverse range of working environments.

While the operations and workforces of the defendant companies are substantially different, they are linked in several ways. All the defendants maintain a common job, salary, and pay-grade system that dictates salary ranges for both exempt and non-exempt employees. Non-exempt employees are classified from grade NE1 through NE9; exempt employees are classified at grades E1 through E15. Salary ranges for each grade vary significantly.[4] While the same pay-grade system is used within all of

[4] In 1998, for example, grade E5 ranged from $ 42,396 to $ 67,837, and grade E3 ranged from $ 34,020 to $ 54,432. Thus, an employee with a salary at the upper range of one grade might receive a higher salary than an employee with a salary in the lower range of the next higher grade. This could result in a white employee in a lower salary grade receiving a higher salary than a black employee in a higher salary grade. The plaintiffs say that the defendants exploited this possibility to mask racial discrimination.

TSC's subsidiaries, the workforces within the different companies are strikingly different. Not every position exists in every company, and in some subsidiaries the job responsibilities for a given position differ greatly from the responsibilities for the same position in another subsidiary. Job positions may also correspond to different pay-grade ranges within different subsidiaries.

The terms of compensation for unionized workers are strictly governed by the terms of the CBA, giving managers precious little discretion over salary and similar issues. For non-unionized workers, hiring and promotion decisions are made by managers of various rank based in geographically dispersed facilities within each of the defendant companies. Different managers assign various weights to different qualifications in making their employment decisions, and managers have the discretion to utilize a wide range of processes and procedures when making compensation and promotion decisions.

Several different types of promotions are available to non-unionized employees. Most competitive job openings – jobs open to any qualified employee – are posted on a computer intranet system known as "JobNet," which is accessible to employees within each TSC subsidiary. SCS recommends standardized processes for filling JobNet positions, but managers within the various subsidiaries retain discretion in choosing whether to post job vacancies.

Other promotions occur outside the context of the competitive promotions available on JobNet. For example, employees can advance within their own "job family. "These "progressive promotions" occur when employees meet predetermined performance goals or demonstrate satisfactory work over a given period. Under these circumstances,

an employee may be promoted, for example, from an Operator II position to an Operator I position. These promotions are not competitive since they do not involve unfilled positions, but rather are available only to employees progressing individually within their own job family.

SCS also provides numerous programs and procedures designed to assist managers within the other defendant companies in evaluating employees and making compensation and promotion decisions. These procedures are designed to ensure that employees are evaluated, compensated, and promoted based on job-related factors, in accordance with the companies' strict prohibitions on discrimination on account of race. Thus, for instance, SCS provides the defendant companies with resources to assist managers in promotion decisions, including structured interview guidelines, designed to evaluate job-related skills. SCS also recommends that employees receive regular written and oral evaluations, and develops specific evaluation forms for this purpose.

SCS and the other defendants have all developed affirmative action plans to address workforce diversity, and they also provide professional development and professional mentoring programs to facilitate employees' professional growth. SCS's Equal Employment Opportunity ("EEO") Department has primary responsibility for ensuring compliance with anti-discrimination and equal opportunity laws. The EEO Department's policy is to investigate discrimination complaints, and if any discrimination or harassment is revealed, to take remedial action to eliminate the discrimination or harassment. SCS's EEO Department also acts in conjunction with Compliance Officers within each defendant company to conduct annual compliance surveys. Every individual

employee within the defendant companies receives an annual compliance questionnaire, which asks whether the employee is aware of any incidents of discrimination or harassment.

The EEO Department also conducts quarterly Equal Employment Opportunity reviews designed to ensure that all the defendant companies comply not only with the applicable anti-discrimination laws, but also with their own internal policies. In these reviews, the EEO Department evaluates the hiring, promotion, and compensation practices of randomly selected departments within the various defendant companies, with the goal of remedying any inconsistencies that may exist between a department's practice and the defendant's EEO policies.

The defendant companies have also implemented various training programs to promote compliance with all EEO policies and anti-discrimination laws. Many of the defendants' managers are required to attend "FEDLAW," a one-day seminar that provides an overview of the federal anti-discrimination laws applicable to the defendants' workplaces. The defendants also encourage their employees and managers to attend another one-day training session, the "Civil Treatment" seminar. In the "Civil Treatment" training, employees are reminded of the defendants' anti-discrimination policies and encouraged to report any violations.

Finally, all employees of SCS and SCES are entitled to raise EEO concerns with SCS's Employee Concerns department, and unionized employees at GPC may raise discrimination complaints with their union stewards, pursuant to successive agreements between GPC and Local 84 of the IBEW. GPC employees may also bring

complaints to the Corporate Concerns Department or the Corporate Security Department.

B.

The seven named plaintiffs are African Americans who work (or formerly worked) in a wide assortment of union and non-union positions within GPC, SCS and SCES, and who have been subjected to compensation and promotion decisions made by different managers utilizing different procedures. We analyze in detail the individual claims of each plaintiff in Section III, *infra*, which addresses each of the summary judgment orders, but offer here a brief summary of each plaintiff's work history in order to measure his or her claims against the standards embodied in Rule 23 of the Federal Rules of Civil Procedure.

Cornelius Cooper ("Cooper") works as a Lineman for GPC in Atlanta, Georgia, where he has been employed since 1973. At the time the suit was filed, Cooper had been employed by GPC for some 28 years. He has been a union member during his employment at GPC, and thus, his compensation and promotions within the bargaining unit have been governed by the terms of the CBA. Cooper received his current Lineman position in 1981 and has not been promoted since, in spite of positive work evaluations; he claims that less qualified white employees have been promoted while he could not advance for nearly 20 years.

Cooper has not taken the First Line Supervisor test, nor has he applied for a Foreman position since at least 1990, because no Foreman positions have been open in that time. He has not applied to be a crew leader. However, Cooper maintains that he suffered discrimination

when he was denied two promotions in 1998. The first position that Cooper was denied was as a Lighting Coordinator, an opening that was posted on JobNet in July 1998. Later that year, Cooper applied for and was denied a non-union Methods & Training Specialist ("Trainer") position at the Klondike Training Center. Of several Trainer jobs open at the time, at least one was awarded to an African-American employee, Charlie Johnson.

Michael Edwards ("Edwards") had worked at GPC for 13 years when this suit was commenced. Like Cooper, Edwards has held a variety of union positions in which his compensation and promotions were subject to the terms of the CBA. Over the course of his employment with GPC, Edwards worked in several different departments of the company, based in different cities throughout Georgia. He maintains that he has been denied various promotions to union positions, especially in the two years immediately before the suit was filed, and was frequently denied even an opportunity to interview for these positions.

In April 2000, Edwards did interview for a Cable Locator position, but was denied the job. Edwards says that he was fully qualified for the position, having worked for 5 months as a Cable Locator in a temporary capacity, and having worked as a Lineman, which involved more extensive and difficult responsibilities than a Cable Locator. In spite of his qualifications, Edwards did not receive the job, which was instead given to a white co-worker whom Edwards argues was less qualified. Edwards was denied the Cable Locator position after his interviewers found his demeanor "too relaxed."

During his tenure at GPC, Edwards suffered injuries to his back, and as a result he has had several extended

absences and light duty assignments. Between May and November, 1998, Edwards took a medical leave from GPC, returning to take a temporary position which he held until its elimination in April 2000. Since that time he has been out of work on disability leave.

Edwards filed a complaint with the EEOC in 1999, alleging a violation of the Americans with Disabilities Act ("ADA"), but he did not allege any race-based discrimination at that time. Less than a week prior to the filing of this suit, however, he lodged a complaint with the EEOC that alleged individual and class-wide racial discrimination. On appeal, Edwards raises three other promotion claims that were not included in the Complaint.

Charcella Green ("Green") had been employed at GPC for 17 years when this suit was filed. For the last 11 of those years she worked as an Education Services Coordinator, after having been employed in various capacities since initially joining GPC as a temporary intern in 1983. While Green advanced through various positions at GPC, she acquired several educational credentials. Prior to joining GPC, Green received a B.S. degree in Human Services Administration from Mercer University, and in 1983 she was awarded a Master of Social Work degree. While working at GPC, she continued her education, eventually receiving a Ph.D. from Clark Atlanta University.

From 1996 until her department was eliminated in 2002, Green worked at GPC's headquarters in Atlanta in a range of exempt positions in the Educational Services department. She complains that she was wrongfully denied an Educational Services Manager position in 1996 and a Community Advisor position in 1997. On July 11,

1998, Green was again denied a Manager of Educational Services position that was awarded to a white employee. Green also says that she has been compensated at a less favorable rate than white employees.

Patricia Harris ("P. Harris") voluntarily resigned from SCS in August 1999, prior to the commencement of this case. P. Harris began working at GPC in 1990, and became an employee of SCS in 1997, when she began working as a Market Research Analyst in Atlanta. P. Harris did not apply for any promotions during the relevant period and did not file any complaints with the EEOC. However, she maintains that she was only granted her Market Research Analyst position after repeatedly complaining – including to a GPC Vice President – about the difficulty of advancing. P. Harris contends that her white counterparts were promoted much more easily, and says that once she began working as a Market Research Analyst, she was provided with less training and support than her white colleagues.

P. Harris also claims that she suffered discrimination in compensation on account of race, observing that she was paid at the low end of her salary grade, while white colleagues were more generously compensated, notwithstanding their being less qualified. Indeed, P. Harris points out that she earned a Master of Business Administration degree, while her white co-workers lacked that credential.

Sarah Jean Harris ("S.J. Harris") was employed by GPC from 1979 until 2000, working in various non-exempt, non-union customer services positions in Lawrenceville, Duluth, and Gwinnet, Georgia. Hired in 1979 as a General Clerk, she had been promoted to Operating Assistant by 1989. In 1994, S.J. Harris was assigned to

work in Duluth as a Secretary; her job title was changed to Region Support Representative in 1997. Working as a Region Support Representative, S.J. Harris was the only African-American employee in an 18-person department. She alleges that she was discriminated against in her employee evaluations, claiming that she received lower evaluation scores than she deserved, while white employees received inappropriately positive evaluations. She also observes that she received only "minuscule" salary increases during her tenure, and has therefore received lower compensation than white employees.

S.J. Harris did not apply for any promotions during the relevant period and has brought no promotion claims. However, in addition to raising her compensation discrimination claims, S.J. Harris contends that she was wrongfully fired in retaliation for her involvement in this lawsuit. GPC denies any retaliatory motive and contends that she was fired for disciplinary reasons, after having received several negative evaluations and having been placed in a disciplinary program. While on "last-chance" probation, S.J. Harris was again disciplined, and then was terminated.

Irene McCullers ("McCullers") was hired by GPC in 1978, and worked in several clerical positions until 1997, when she was transferred to SCS. Since 1997, McCullers has worked at SCS as a non-exempt Processing Operator I in the Information Management Services Department. Altogether, McCullers had spent 23 years working for the defendant companies at the time suit was filed. McCullers alleges that she was discriminated against in terms of her compensation, promotions, and performance evaluations.

Specifically, McCullers contends that within her department there are six employees working as Processing Operators: two African-American and two white employees hold Processing Operator I titles, and two white employees hold Processing Operator Senior positions. McCullers alleges that she and her African-American colleague are victims of racial discrimination in that they are the lowest paid employees. McCullers adds that she is paid approximately 10% less than her white colleagues, even though she has an associates degree in business administration, while the white employees have no more than a high school education.

McCullers also maintains that she has been discriminated against in promotions. She avers that at the time her department was reorganized in 1997, she was discriminatorily denied a progressive promotion from Processing Operator I to Processing Operator Senior, while at least one white counterpart was promoted to the senior position. In the two years before this litigation commenced, McCullers was again denied a promotion to Processing Operator Senior, while another white colleague was promoted.

Finally, Carolyn Wilson ("Wilson"), the seventh of the named plaintiffs, began working for the defendants in 1985, when she was hired by GPC as an employee in its Customer Service Operations. In 1997, she was hired as a Project Analyst in the Finance Center at SCES. Wilson maintains that she experienced racial discrimination in promotion and compensation decisions, as well as with respect to her performance evaluations. Wilson says that she uniformly performed her job well and received positive performance evaluations, and yet was denied numerous promotions for which she was qualified. She adds that

while she applied for approximately 15 promotions within the defendant companies, she was granted only 3 interviews, and was denied several promotions because of her race. In November 1997, Wilson applied for and was granted a Project Analyst Senior position at SCES, which she learned of through the JobNet system, but her position was re-classified as a Project Analyst III, a lower-level position than she had sought. The following year, Wilson applied for and was offered a Customer Service Representative position, but turned it down.

At approximately the same time this lawsuit was commenced, Wilson filed a charge with the EEOC, but she did not identify the specific event or events that constituted the discrimination she faced, instead alleging discrimination more generally. She maintains that she is compensated less favorably than at least four white colleagues who perform the same job as she does, even though they are classified at the same, or lower, salary grades.

To summarize, of the seven named plaintiffs, three no longer worked for any of the defendants at the time this case was commenced (Edwards, P. Harris, and S.J. Harris). Of the four remaining employees, one held a position which was covered by the CBA (Cooper), two held exempt positions outside senior management (Green and Wilson), and one held a non-exempt position (McCullers).

Although at various times during their employment with the defendants, some of the plaintiffs worked in Georgia locations outside metropolitan Atlanta, most of them were employed in Atlanta for most or all of their tenures. Several of the named plaintiffs worked in office environments characteristic of the central administrative

operations that took place in Atlanta, and even Edwards and Cooper – who labored in connection with the direct delivery of electricity – worked in more developed urban areas of Georgia. None of the named plaintiffs worked in the less densely populated, rural areas of the state, and although the plaintiffs sought to represent a broad class including employees based throughout Florida, Mississippi, and Alabama, none of them worked within these states.

All of the plaintiffs complained of discrimination in either compensation or promotion, and while none of the plaintiffs produced direct evidence that the personnel decisions in their individual cases were motivated by race, each plaintiff alleged that he or she was victimized by a common policy of subjective decision-making that allowed discrimination to persist in the defendant companies. Specifically, the plaintiffs' Complaint asserted that there was a class-wide "continuing pattern and practice of racial discrimination," that they and the putative class members were subjected to discriminatory treatment, and that the defendants' policies and practices "had an ongoing disparate impact."

Two major issues are presented in this appeal. First, plaintiffs argue that the district court abused its discretion when it denied their motion for class certification under Rule 23 of the Federal Rules of Civil Procedure. Second, they say that the district court erred when it granted summary judgment in favor of the defendants on each of the seven named plaintiffs' individual claims. We address each of these issues in turn.

II.

We begin with the plaintiffs' basic argument that the district court abused its discretion when it denied their motion for class certification.[5] In denying the plaintiffs'

---

[5] As a preliminary matter, the defendants suggest that if we affirm the district court's summary judgment orders as to each of the named plaintiffs, the class certification issue is moot. This position has intuitive appeal, since it might seem improbable that plaintiffs whose own claims cannot survive summary judgment could represent a larger class of plaintiffs. That is, if we affirm the final orders of summary judgment on the named plaintiffs' claims, it would appear unnecessary to reach the class certification issue, because even if other class members retained valid claims, they would have no representative plaintiffs to prosecute their claims. *See Satterwhite v. City of Greenville*, 634 F.2d 231, 234 (5th Cir. 1981) (*en banc*) (Gee, C.J., dissenting) (arguing that requiring an appellate court to revisit the class certification issue even if the named plaintiffs' claims fail could lead to the "extreme" result "that a class need have no personal representative at all: only a putative cause and a counsel").

The plaintiffs, on the other hand, have directed our attention to *Martinez-Mendoza v. Champion International Corp.*, 340 F.3d 1200 (11th Cir. 2003), in which a panel of this Court held that "even after finding against plaintiffs on the merits, the [district] court should have determined whether the class action could be maintained, and whether the plaintiffs could represent that class." *Id.* at 1215. *Martinez-Mendoza* reflects established Circuit precedent that requires us to revisit the class certification issue even if we affirm summary judgment for the defendants.

In *White v. I.T.T.*, 718 F.2d 994 (11th Cir. 1983), a panel of this Court explained that where

> a plaintiff brings both an individual and class action; the class action is dismissed pretrial; he loses his individual claim at trial and then appeals the dismissal of his class action . . . we have remanded the case to the district court to determine (1) the presence of a live controversy involving the proposed class, and if one is present, (2) whether, pursuant to Rule 23, the action is appropriate for class certification and the appellant is a proper representative of the proposed class (or if not, whether there exists an appropriate class representative who can be substituted for the appellant).

(Continued on following page)

motion, the district court first considered the plaintiffs' anecdotal and statistical evidence, before concluding that the plaintiffs could not satisfy the basic requirements of Rule 23(a) of the Federal Rules of Civil Procedure.[6] Alternatively, the district court held that individual questions of law and fact plainly outweighed any common questions, and therefore that this suit was not appropriate for certification under either subsection (2) or (3) of Rule 23(b) of the Federal Rules of Civil Procedure.[7] The plaintiffs maintain

---

Id. at 997-98. It is "the law of this circuit . . . [that] a plaintiff's capacity to act as representative of the class is not ipso facto terminated when he loses his case on the merits." *Martinez-Mendoza*, 340 F.3d at 1215; *see also Satterwhite*, 634 F.2d at 231-32; *Armour v. City of Anniston*, 654 F.2d 382, 383 (5th Cir. Unit B Aug. 1981) (per curiam). (In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.).

Under the law of this Circuit, a live controversy involving a putative class may continue even when the claim of a specific plaintiff fails. Thus, even if we affirm each summary judgment order entered against the individual plaintiffs, the class certification issue may not be moot, and we are still required to address the district court's denial of class certification.

[6] Rule 23(a) provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed R. Civ. P. 23(a). We refer to these four requirements as the numerosity, commonality, typicality, and adequacy criteria. *See Prado-Steiman v. Bush*, 221 F.3d 1266, 1278 (11th Cir. 2000).

[7] Rule 23(b) provides, in pertinent part, that:

> an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(Continued on following page)

that the district court's denial of class certification results from "fundamental errors of law and a fundamental misconception of the role of the court in ruling on a motion for class certification." Appellants' Brief at 8. We remain unpersuaded.

A.

Questions concerning class certification are left to the sound discretion of the district court. *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1386 (11th Cir. 1998) (*en banc*); *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1347 (11th Cir. 1983). "A district court's decision whether or not to certify a class under Rule 23 of the FRCP is reviewed for abuse of discretion. As long as the district court's reasoning stays within the parameters of Rule 23's requirements for the certification of a class, the district court

---

. . . .

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed R. Civ. P. 23(b).

decision will not be disturbed." *Hines v. Widnall*, 334 F.3d 1253, 1255 (11th Cir. 2003) (citations omitted).

Even if we would have certified a class, that does not mean the district court abused its discretion in declining to do so. *Id.*; *see also Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1374 (11th Cir. 1984). Indeed, the distinguishing hallmark of abuse-of-discretion review is that it "presupposes a zone of choice within which the trial courts may go either way." *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 971 (8th Cir. 1984).

> By definition . . . under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call. That is how an abuse of discretion standard differs from a *de novo* standard of review. As we have stated previously, the abuse of discretion standard allows "a range of choice for the district court, so long as that choice does not constitute a clear error of judgment."

Rasbury v. I.R.S., 24 F.3d 159, 168 (11th Cir. 1994) (*quoting United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989) (citation omitted)).

First, the plaintiffs argue that the district court erred by "reaching the merits" of the plaintiffs' claim at the preliminary stage of class certification. Thus, we are required to determine whether the trial court properly assessed the plaintiffs' evidence only to the extent necessary to decide the issue of class certification, or whether the trial judge impermissibly usurped the role of the jury by ruling on the merits of the plaintiffs' statistical and expert evidence. After thorough review of this record, we are satisfied that the district court did not improperly

invade the jury's province when it conducted (as it was required to do in this case) a rigorous analysis of the evidence proffered by the parties at the class certification stage.

The plaintiffs rely on the Supreme Court's often-cited admonition in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), that "nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177, 94 S. Ct. at 2152. However, we have noted that "while it is true that a trial court may not properly reach the merits of a claim when determining whether class certification is warranted, this principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements." *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984) (citation omitted).

Indeed, both the Supreme Court and this Court have noted since *Eisen* that evidence pertaining to the requirements embodied in Rule 23 is often intertwined with the merits, making it impossible to meaningfully address the Rule 23 criteria without at least touching on the "merits" of the litigation. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12, 98 S. Ct. 2454, 2458 n.12, 57 L. Ed. 2d 351 (1978) ("Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims." (citation omitted)); *Nelson v. U.S. Steel Corp.*, 709 F.2d 675, 679 (11th Cir. 1983) (explaining that Rule 23(a) evidence "is often intertwined with the merits").

As the Supreme Court has noted, the bare allegation that racial discrimination has occurred "neither determines whether a class action may be maintained . . . nor defines the class that may be certified." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157, 102 S. Ct. 2364, 2370, 72 L. Ed. 2d 740 (1982). Rather, before a district court determines the efficacy of class certification, it may be required to make an informed assessment of the parties' evidence. That a trial court does so does not mean that it has erroneously "reached the merits" of the litigation. *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 722 (11th Cir. 1987).

In this case, the district court was obliged to make some preliminary assessment of the plaintiffs' evidence to determine, at the very least, whether the named plaintiffs were claiming discrimination that was common to the members of the putative class. Indeed, the district court would have erred if it had certified a class without first determining that the named plaintiffs had claims common to those of the unnamed class members.

B.

We turn, then, to whether the court's substantive determinations at the class certification stage amounted to an abuse of discretion. The plaintiffs say that the district court erred by concluding that they had failed to establish the commonality, typicality, and adequacy[8] requirements of

[8] The district court concluded that because they failed the commonality and typicality requirements under Rule 23(a), the named plaintiffs could not adequately represent the other putative class members. *See Cooper*, 205 F.R.D. at 627. The district court did, however, determine that the plaintiffs' counsel were "capable and

(Continued on following page)

Rule 23(a). They claim that there were questions of law and fact common to the entire class and that the claims of the named plaintiffs were in fact typical of all the class members.

The four basic requirements of Rule 23(a) are "designed to effectively limit class claims to those 'fairly encompassed' by the named plaintiffs' individual claims." *Prado-Steiman*, 221 F.3d at 1278 (*quoting Falcon*, 457 U.S. at 156, 102 S. Ct. at 2370) (internal quotation marks omitted). As the district court put it, Rule 23(a) is designed to ensure that "the common bond between the class representatives' claims and those of the class is strong enough so that it is fair for the fortunes of the class members to rise or fall with the fortunes of the class representatives." *Cooper*, 205 F.R.D. at 608-09.

The typicality and commonality requirements are distinct but interrelated, as the Supreme Court has made clear:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

Falcon, 457 U.S. at 157 n.13, 102 S. Ct. at 2370 n.13. We have similarly explained that "the commonality and

---

experienced lawyers who would more than adequately represent the class, were a class certified." *Id.* The defendants do not challenge this conclusion concerning the adequacy of plaintiffs' representation.

typicality requirements of Rule 23(a) overlap. Both requirements focus on whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual class members to warrant class certification." *Prado-Steiman*, 221 F.3d at 1278.

"A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3)." *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001). "Typicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large." *Prado-Steiman*, 221 F.3d at 1279.

While not entirely dissimilar to the typicality requirement, Rule 23(a)'s commonality requirement measures the extent to which all members of a putative class have similar claims. "Traditionally, commonality refers to the group characteristics of the class as a whole [while] typicality refers to the individual characteristics of the named plaintiff in relation to the class." *Id.* Under the commonality requirement, "a class action must involve issues that are susceptible to class-wide proof." *Murray*, 244 F.3d at 811.

Neither the typicality nor the commonality requirement "mandates that all putative class members share identical claims, and . . . factual differences among the claims of the putative class members do not defeat certification." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (citation omitted); *see also Prado-Steiman*, 221 F.3d at 1279 n.14; *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985). Nevertheless, the named plaintiffs' claims must still share "the same essential characteristics as the

claims of the class at large." *Appleyard*, 754 F.2d at 958 (citation and internal quotation marks omitted).

As for the typicality requirement, the district court concluded that while some of the named plaintiffs had claims that could be typical of subgroups within the larger class, collectively the named plaintiffs did not have claims typical of the entire class. Thus, for example, plaintiff Edwards's claims were uniquely tied to issues relating to his disability; plaintiff S.J. Harris's claims could not be divorced from the disciplinary issues relating to her case; and although Cooper's claims were typical of union members denied promotion to non-union jobs, they were not typical of those union members who might have complaints relating to the denial of union positions.

Similarly, none of the named plaintiffs had claims typical of members of the putative class who were denied senior management positions, nor did any of the named plaintiffs have compensation claims typical of upper-management employees. And while the plaintiffs' claims may have been typical of some subclasses of the defendants' workforce, it is not certain that their claims would be typical of other subclasses. Thus, for example, the specific job-related criteria GPC uses to make employment decisions affecting its rural power-delivery operations may be very different from the criteria underlying decisions about employees in their administrative offices. As a result, the named plaintiffs did not present claims typical of the full range of employees in their putative class.

The plaintiffs argue, nevertheless, that the district court erred by focusing on the idiosyncratic features of the different named plaintiffs' claims instead of acknowledging that the claims of the plaintiffs and the members of the

larger class were based on the same legal theories. That is, the plaintiffs say that their individual injuries "arise out of the same pattern and practice [of discrimination] and same [discriminatory] policies that give rise to the injuries of the class members." Appellants' Brief at 18.

We reiterate that our review is only for abuse of discretion, and that whether we would have certified the class in the first instance – or even some grouping of subclasses – is not dispositive. *Hines*, 334 F.3d at 1257; *see also Shroder*, 729 F.2d at 1374. Here, the district court's analysis as to typicality fell within the range of choice permissible on abuse-of-discretion review and did not represent a clear error in judgment. *See Kelly*, 888 F.2d at 745.

First, the compensation and promotion decisions affecting each of the named plaintiffs were made by individual managers in disparate locations, based on the individual plaintiffs' characteristics, including their educational backgrounds, experiences, work achievements, and performance in interviews, among other factors. In *Love v. Turlington*, we held that the district court had not abused its discretion in denying class certification based on the plaintiffs' failure to meet the typicality and commonality requirements. 733 F.2d at 1564. That case involved a challenge to Florida's SSAT-I, a test designed to identify high school students who had failed to master one of the state's academic performance standards. Students failing the test were identified for remedial assistance, but a failure did not automatically render a student ineligible for a high school diploma. Rather, decisions on each individual student's eligibility for a diploma were "made by individual teachers on the basis of [the student's] individual achievements. Each student's situation differs,

and the diploma is denied each student for reasons which are unique to his situation, and which do not necessarily correspond to his performance on the SSAT-I." *Id.* Similarly, in the instant case the compensation and promotion decisions affecting each of the named plaintiffs were based on factors that, by and large, appear unique to each of the plaintiffs in question.

In addition, the plaintiffs sought to represent a very broad class that purported to represent all African-American employees of the defendants, at all levels of the corporate hierarchy of all the defendant companies. Because the plaintiffs asserted broad claims on behalf of a broad class, they were required to identify representative plaintiffs who shared those broad claims. However, while the different named plaintiffs may have had claims that were typical of some conceivable subgroups of the overall class, the seven named plaintiffs, collectively, did not have claims that would have been typical of the entire class. *See Falcon*, 457 U.S. at 156, 102 S. Ct. at 2370; *Hines*, 334 F.3d at 1257-58. As a result, we are constrained to conclude that the district court's conclusions regarding typicality did not constitute a clear error of judgment, nor were they otherwise outside the range of choices the district court was allowed to make.

As for the commonality requirement, the district court concluded that it was impossible to say that the employment histories of the named plaintiffs and the ways in which they claimed to have experienced discrimination could be "fairly compared with the history or individual experiences of absent class members," or that the claims of class members shared such common features that rulings could be fashioned to fairly adjudicate the claims as a group. *Cooper*, 205 F.R.D. at 610-611. Where, as here, class

certification was sought by employees working in widely diverse job types, spread throughout different facilities and geographic locations, courts have frequently declined to certify classes. *See, e.g., Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 239 (W.D. Tex. 1999) (denying certification where proposed class spread across fifteen states and involved seventeen business units); *Troupe v. Randall's Food & Drugs, Inc.*, 1999 U.S. Dist. LEXIS 11620, No. CIV.A. 3:98-CV-2462, 1999 WL 552727, at *5 (N.D. Tex. July 28, 1999) (declining to certify proposed class that covered at least "fifty separate stores spread over two large cities and their outlying suburbs" with "management practices vary[ing] widely according to stores across the division").

Since the hiring, compensation, and promotion decisions at issue were made by different managers in different companies implementing different policies, even if the named plaintiffs established that they were, individually, subjected to intentional discrimination, they would not necessarily have established that other class members suffered from the same discrimination. Commonality in the claims of the broad class the plaintiffs sought to certify would have to be established by showing that the discrimination sustained was either part of an overarching pattern and practice of intentional discrimination on the part of the defendants or the result of the discriminatory disparate impact of a facially neutral employment policy.

We explain the elements required to sustain a successful pattern and practice or disparate impact claim more fully in Section III.B., *infra*, but a brief overview suffices for our purposes here. To establish a "pattern or practice"

of disparate treatment,[9] the plaintiff must show that intentional discrimination was the employer's "standard operating procedure." *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263 at 1274 (explaining different types of discrimination claims in context of gender discrimination). The plaintiff can prove that discrimination was the standard operating procedure "through a combination of statistics and anecdotes." *Id.* To prove disparate impact, a plaintiff must establish the existence of a statistically significant disparity among members of different groups affected by a type of employment decision; a specific, facially neutral employment practice involved in the decision; and a causal nexus between the facially neutral employment practice and the statistically significant disparity. *Id.*

Thus, it was plainly necessary for the district court to evaluate the statistical evidence the plaintiffs submitted in order to determine whether it established the discrimination of which plaintiffs complained. The district court concluded the statistical "analysis had some limitations which undermined its usefulness in measuring whether Defendants' employment practices were racially neutral." *Cooper*, 205 F.R.D. at 613. Because of substantial analytical flaws in the statistical evidence, the plaintiffs had made an "inadequate showing . . . to raise a presumption of discrimination arising from application of the collective whole of Defendants' compensation and promotion policies. Thus, disparate impact analysis produced no evidence

[9] To prove disparate treatment, a plaintiff (as do plaintiffs here) usually seeks to establish that he or she is a member of a protected group; that he or she was subjected to an adverse employment decision; that the employer treated similarly situated employees outside the protected group more favorably; and that he or she was qualified for the job. *Joe's Stone Crab*, 220 F.3d at 1274-75.

common to the claims of all class members. Also, the [statistical evidence] failed to establish evidence of a pattern and practice of discrimination." *Id.* at 615 (emphasis added).

The plaintiffs' primary statistical evidence was found in reports by Dr. Janice Madden, who analyzed employment data provided by the defendants.[10] Dr. Madden's reports concluded that African Americans received fewer promotions than would be expected given their numbers in the workforce. However, after analyzing Madden's methodology and conclusions, the district court identified several basic infirmities that undermined the reports' substantive value. The district court did not exclude Dr. Madden's reports because she was unqualified or because the reports were based on a wholly unreliable methodology; rather, the court accepted the reports' conclusions but determined that they still failed to establish that the

[10] The plaintiffs also submitted an expert report prepared by Dr. Kevin R. Murphy, a psychologist, who examined various affidavits and deposition testimony provided by the plaintiffs and concluded that while the defendants actually had policies in practice to prevent discrimination, they undermined these policies "by affording managers discretion to ignore those policies and use criteria that are not job related" in making compensation and promotion decisions. R119-56 at 2. In essence, Murphy's report recapitulated the basic allegations of the plaintiffs in the guise of an expert report. The defendants submitted an expert report prepared by Dr. Ronald R. Sims, which concluded that Murphy's report was "neither accurate nor reliable," R136-2 at 4, and that in fact the defendants had in place policies that prevented managers from exercising unfettered discretion to make decisions on non-job-related bases. We agree with the district court that the reports of Murphy and Sims, which reach sweeping conclusions about what may or may not occur within the defendant companies, are of extremely limited use, lacking statistical evidence to substantiate broad claims that, in essence, simply recharge the allegations of the parties to this litigation. *See Cooper*, 205 F.R.D. at 611 & n.24.

named plaintiffs had claims in common with other class members under either a pattern and practice or disparate impact theory.

In the first place, the district court noted that Madden's reports did not incorporate variables that would allow for the comparison of individuals who were similarly situated with respect to managerial decision makers, job types, locations, departments, and the specific criteria relevant for the jobs in question. Madden did not tailor her analysis to the specific positions, job locations, or departmental and organizational structures in question; however, the wide-ranging and highly diversified nature of the defendants' operations requires that employee comparisons take these distinctions into account in order to ensure that the black and white employees being compared are similarly situated. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57, 109 S. Ct. 2115, 2124-25, 104 L. Ed. 2d 733 (1989) ("[A] Title VII plaintiff does not make a case of disparate impact simply by showing that, 'at the bottom line,' there is racial imbalance in the work force."); *see also Brown v. Am. Honda Motor Co.*, 939 F.2d 946, 952 (11th Cir. 1991) ("Statistics . . . without a [proper] analytic foundation[] are virtually meaningless."); *Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 319 (7th Cir. 2003) ("The Supreme Court has emphasized the importance of looking to the proper base 'group' when making statistical comparisons and examining all of the surrounding facts and circumstances which create the statistics themselves.").

As the district court observed, Madden's reports did not take into account the type or level of acquired skills of job applicants. Madden's "education" component failed to take into account the field of study, the relevance of that

field to any position in question, or the quality of the educational institutions involved, factors which may be important in some managers' employment decisions.

Moreover, Madden calculated "experience" only by tabulating the amount of time that had passed since an individual finished his or her formal education and the amount of time that individual had spent on the defendants' payroll. That two employees completed their education in the same year does not ensure that they have similar levels of job-related experience, since what those employees have done in the intervening years may be extraordinarily different. While Madden's "experience" variable may have measured the passage of time, it did not in any way factor in the quality, type, or relevance of an employee's experience. And the reports did not factor in any employee's actual job performance, a consideration that is undeniably important in decisions relating to compensation and promotion. Indeed, without taking into account job performance at all, the fact that two employees began their employment with the defendants at the same time and have not been promoted at the same rate does not establish that discrimination is at work.

In essence, the district court concluded that these methodological deficiencies rendered it "impossible to determine what the [salary and promotions] gaps were, whether they were statistically significant, or whether factors other than race were involved." *Cooper*, 205 F.R.D. at 615. Thus, the district court observed that "there had been an inadequate showing by Plaintiffs to raise a presumption of discrimination arising from application of the collective whole of Defendants' compensation and promotion policies." *Id.*; *see also Maddox v. Claytor*, 764 F.2d 1539, 1552 (11th Cir. 1985) ("[Multiple regression analysis]

measures the probability that the calculated disparity could occur randomly – but the analysis in no way validates the calculation of the disparity itself. If the tested disparity is based on erroneous assumptions or suffers from flaws in the underlying data, then standard deviation analysis is foredoomed to yield an equally faulty result."); *Eastland v. Tenn. Valley Auth.*, 704 F.2d 613, 621-24 (11th Cir. 1983).

The district court also observed that Madden's analysis of promotion rates was, similarly, grounded in insufficiently tailored data. Significantly, Madden failed to distinguish between competitive promotions – those open to any qualified candidate – and progressive promotions – those available only to individual employees progressing in a "job family" – a distinction that is crucial when analyzing promotions. *See Forehand v. Fla. State Hosp.*, 89 F.3d 1562, 1572-73 (11th Cir. 1996). As for progressive promotions, because Madden recognized promotions only when an employee received an increase in salary grade, moved from a non-exempt to an exempt position, or moved from a union job into a higher-paying non-union job, Madden's calculations did not capture those that occurred within the same salary grade. As for competitive promotions, Madden did not take into account how many and which employees actually applied for them, also a significant factor in making any meaningful generalizations about allegedly discriminatory promotion practices.

As part of her analysis, Madden divided the employees into different "pools," or subsets, of employees, and her analysis revealed statistical deficiencies in only some of the pools. Of the 148 pools of employees analyzed in 1998-1999, Madden's analysis revealed a representational deficiency of African-American employees in only three

pools: two union salary-grade pools and one pool for non-exempt salary-grade-5 employees. The district court concluded that this actually could be evidence that the promotional deficiencies for African Americans may have existed only in some segments of the workforce, and therefore not throughout the entire class.

Finally, the district court observed that Madden's reports did not establish the existence of any specific promotion or compensation policy or practice, let alone trace the alleged racial disparities to such a policy or practice. In addition, the Madden reports did not make any reference to any of the specific named plaintiffs or their specific similarly-situated comparators, making it altogether unclear how the reports could establish commonality among these named plaintiffs' claims and the overall claims of the affected class.[11]

---

[11] Several of the flaws in plaintiffs' statistical evidence that the district court highlighted were initially pointed out in the report of defense expert Dr. Joan G. Haworth, an economist, who included statistical analyses that contradict Madden's reports and support the defendants' claim of no discrimination. In response to these criticisms of Dr. Madden's statistical reports, the plaintiffs cite *Bazemore v. Friday*, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986), which held that the failure of the plaintiffs' multiple regression analyses to incorporate all conceivable variables affected the weight of the analyses but not their admissibility. Plaintiffs argue that the district court here ignored *Bazemore* by inappropriately evaluating the probative value of the statistical evidence, rather than leaving that task to the jury.

Plaintiffs' reliance on *Bazemore* is unavailing in this case. First, *Bazemore* held that a statistical analysis should not be rejected merely because it fails to incorporate every possible variable; it did not hold that any statistical report, no matter how many critical variables were missing, should automatically present a jury question, indicating that there are "some regressions so incomplete as to be inadmissible as irrelevant." *Id.* at 400 n.10, 106 S. Ct. at 3009 n.10. Moreover, in

(Continued on following page)

The district court concluded that because of these flaws in Madden's models, it was impossible to determine how wide a real gap, if any, existed in salaries and promotion rates among white and black employees, or whether any such gap was attributable to factors other than race. We are persuaded that the district court's basic conclusion – that plaintiffs' statistical evidence was insufficient to establish a presumption of discrimination common to the claims of all members of the putative class – did not constitute a clear error of judgment, nor was the conclusion otherwise outside the acceptable range of choices.

The plaintiffs also proffered, in addition to the statistical evidence, a range of anecdotal evidence that, they claimed, shed additional light on the defendants' allegedly discriminatory policies and practices. Among the evidence presented were reports of several ugly incidents involving nooses displayed at some locations within some of the defendants' facilities, reports of racial jokes and slurs, and the belief expressed by various employees that there was a "glass ceiling" for African-American employees. Finally, plaintiffs filed a series of affidavits of prospective class members who offered anecdotal evidence that repeated many of the claims plaintiffs had made in their pleadings. The district court determined that the anecdotal evidence was "inadequate to establish . . . a pattern and practice of discrimination." *Cooper*, 205 F.R.D. at 619. Again, we conclude that the district court acted within its discretion

---

Bazemore, the plaintiffs submitted independently conducted statistical analyses that confirmed the validity of their regressions, and most importantly, the defendants' statistical analysis reached substantially the same results as did those of the plaintiffs. *Id.* at 401, 106 S. Ct. at 3009. That was not the case here, where the defendants' analyses expressly contradicted those of the plaintiffs.

in determining that, given the sheer size and geographically dispersed nature of the defendants' workforce, the anecdotal evidence – disturbing as some of it may have been – was inadequate to establish discrimination class-wide.

After thorough review of the entire record, we conclude that the district court did not abuse its discretion in determining that the statistical and anecdotal evidence submitted by the plaintiffs did not establish pattern and practice discrimination common to the class or a common disparate impact affecting the defendants' African-American employees class-wide. The powerful differences between the named plaintiffs' claims and the claims of the overall class members meant that procedural fairness for all members of the putative class would not be ensured if the claims of the entire class were allowed to rise or fall on the fortunes of the named plaintiffs' claims.

C.

Even if we concluded, however, that the district court abused its discretion in determining that the plaintiffs did not meet two of the requirements of Rule 23(a), certification would still be inappropriate unless the plaintiffs also could satisfy at least one of the requirements of Rule 23(b). *See Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997). As another ground for its decision, the district court concluded that certification was inappropriate under either Rule 23(b)(2) or Rule 23(b)(3). On appeal the plaintiffs say that the district court erred in refusing to certify a class under Rule 23(b)(2) for injunctive relief and back pay or to certify a hybrid class under Rule 23(b)(2) for injunctive relief, while severing the

damages phase of the proceedings by allowing opt-outs for damages. They also argue that the court should have certified a class under Rule 23(b)(3) for injunctive relief, back pay, and damages. We remain unconvinced and, accordingly, hold that the district court did not abuse its discretion in concluding that the requirements of Rule 23(b) were not satisfied either.

Under Rule 23(b)(2), class certification is appropriate when the requirements of Rule 23(a) are met and the defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Back pay is considered equitable relief and can therefore be awarded in a case certified under Rule 23(b)(2). *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir. 1974).

Here, however, the plaintiffs also sought compensatory and punitive damages, legal relief that can only be awarded in a Rule 23(b)(2) class action when the damages sought are "incidental" to the claims for equitable and declaratory relief. *Murray*, 244 F.3d at 812. Damage claims in a Rule 23(b)(2) class action must be incidental to the equitable and declaratory relief because the basic premise of such a class action – that class members suffer a common injury properly addressed by class-wide equitable relief – "begins to break down when the class seeks to recover . . . monetary relief to be allocated based on individual injuries." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) (*quoting Eubanks v. Billington*, 324 U.S. App. D.C. 41, 110 F.3d 87, 95 (D.C. Cir. 1997)) (internal quotation marks omitted).

We explained in Murray those criteria used to evaluate whether money damages should be considered "incidental" to equitable claims in a 23(b)(2) case. In Murray, we adopted the position of the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*:

> By incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief. . . . Liability for incidental damages should not . . . entail complex individualized determinations. Thus, incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.

Murray, 244 F.3d at 812 (*quoting Allison*, 151 F.3d at 415).[12] In keeping with the requirement that monetary damages be incidental to equitable relief in Rule 23(b)(2) class actions, the advisory committee's note to Rule 23 explains that certification under section (b)(2) is not proper in "cases in which the appropriate final relief relates exclusively or predominantly to money damages."

---

[12] The plaintiffs say that "the question of whether claims for damages are 'incidental' to claims for injunctive relief is improper," Appellants' Brief at 22, and urge this Court to adopt the position taken by the Second Circuit, which has rejected the incidental damages standard. *See Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 167 (2d Cir. 2001). However, Murray unambiguously explained that the *Allison* incidental damages standard is the proper legal standard to analyze certification under Rule 23(b)(2) in the Eleventh Circuit. We are bound to apply the standard outlined in *Murray*, since one panel of this Court cannot overrule another. That power is reserved only to the full Eleventh Circuit sitting *en banc* or to the United States Supreme Court. *Julius v. Johnson*, 755 F.2d 1403, 1404 (11th Cir. 1985).

Fed. R. Civ. P. 23, advisory committee's note (emphasis added).

The plaintiffs argue, nevertheless, that the district court could have certified a class under Rule 23(b)(2) only as to the injunctive and declaratory prayer for relief, thereby excluding altogether the damages issues from class certification. However, to the extent the named plaintiffs were willing to forego class certification on damages in order to pursue injunctive relief that consisted of an admonition to follow general principles of settled law,[13] it is far from clear that the named plaintiffs would adequately represent the interests of the other putative class members. Indeed, to many of the class members (and especially to those who no longer work for the defendants), the monetary damages requested might be of far greater significance than injunctive relief, stated at a high order of abstraction, that simply directs the defendants not to discriminate. Moreover, determining the level of damages to which each class member was entitled plainly would require detailed, case-by-case fact finding, carefully calibrated for each individual employee. The "complex, individualized determinations" necessary to fix the appropriate level of individual damage awards in this case are exactly the type that *Murray* and *Allison* make clear

[13] The injunctive relief specified in the plaintiffs' Complaint consists of a request for "preliminary and permanent injunctive relief to end Defendants' discriminatory practices and to prevent current and future harm to the Named Plaintiffs and the Class." Complaint at 59. Similarly, the Complaint seeks declaratory relief in the form of a "judgment that Defendants' acts and practices as set forth herein are in violation of the laws of the United States." *Id.* Thus, the declaratory and injunctive relief plaintiffs seek amounts, in essence, to an order stating that the defendants discriminated against African-American employees, and enjoining them from discriminating in the future.

should not be considered "incidental" to the claims for injunctive and declaratory relief.[14]

Finally, as the district court noted, since the plaintiffs demanded a jury trial in this case, the parties were entitled under the Seventh Amendment to have all matters at law determined by a single jury before having decisions concerning equitable relief made by the trial court. *See Cooper*, 205 F.R.D. at 629 (citing *Ross v. Bernhard*, 396 U.S. 531, 538-39, 90 S. Ct. 733, 738, 24 L. Ed. 2d 729 (1970)). Under the circumstances of this case, even assuming that the district court could conduct an initial bench trial on the merits of the equitable claims, and that the court actually found in favor of the plaintiffs, it would still

[14] Moreover, the cases plaintiffs cite in support of their claim that the district court abused its discretion by refusing to certify an injunctive class under Rule 23(b)(2) while allowing for opt-outs on compensatory damages are inapposite. Neither *Pettway*, 494 F.2d at 256-60, nor *Penson v. Terminal Transportation Co.*, 634 F.2d 989 (5th Cir. Unit B Jan. 1981), nor, finally, *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), involved a hybrid trial in which members of an injunctive class could opt out for compensatory and punitive damages, since these remedies were not at stake in those cases. Indeed, all of these cases predate the Civil Rights Act of 1991, which changed the landscape of employment discrimination law by making available compensatory and punitive damages (as well as the right to trial by jury) in Title VII cases. We explained in *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1554 (11th Cir. 1986) that "[a] hybrid Rule 23(b)(2) class action is one in which class members seek individual monetary relief, typically back pay, in addition to class-wide injunctive or declaratory relief." (citing *Penson*, 634 F.2d at 994) (emphasis added). The cases relied on by the plaintiffs stand for the proposition that it may be appropriate to use a bifurcated or hybrid trial process in Rule 23(b)(2) cases when class-wide injunctive relief is appropriate, followed by individualized awards of back pay. Significantly, these cases do not hold that such a process is appropriate (much less required, as plaintiffs would have it) when highly individualized awards of compensatory and punitive damages are at stake.

be necessary for a single jury to hear and rule on more than 2,000 individual claims for compensatory damages. Again, on this record we can discern no abuse of discretion in the district court's refusal to proceed under the class action umbrella.

The plaintiffs also say that even if certification under Rule 23(b)(2) was not appropriate, the district court still should have certified the class for equitable relief, back pay, and damages under Rule 23(b)(3). But, for class certification under Rule 23(b)(3) to be appropriate, common questions still must "predominate over any questions affecting only individual members" and the class action mechanism must be "superior . . . for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

We have explained that in addition to the requirements embodied in Rule 23(a), Rule 23(b)(3) "imposes two additional requirements, and increased efficiency is only one of them. Predominance is the other. . . ." *Jackson*, 130 F.3d at 1006. Therefore, "the issues in the class action that are subject to generalized proof and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." *Kerr v. City of W. Palm Beach*, 875 F.2d 1546, 1558 (11th Cir. 1989) (citation and internal quotation marks omitted). Common issues will not predominate over individual questions if, "as a practical matter, the resolution of . . . [an] overarching common issue breaks down into an unmanageable variety of individual legal and factual issues." *Andrews v. AT&T*, 95 F.3d 1014, 1023 (11th Cir. 1996). Our case law plainly establishes that a class action should not proceed under Rule 23(b)(3) when it appears that "most, if not all, of the plaintiffs' claims will stand or fall, not on the question whether [the defendant] has a practice or policy of [race]

discrimination, but on the resolution of . . . highly case-specific factual issues." *Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d 1228 at 1235 (*quoting Jackson*, 130 F.3d at 1006) (internal quotation marks omitted). Indeed, the predominance requirement under Rule 23(b)(3) is "far more demanding" than Rule 23(a)'s commonality requirement. *Jackson*, 130 F.3d at 1005 (citation and internal quotation marks omitted).

Here, the plaintiffs attempted to use statistical proof to establish the existence of a generalized policy of discrimination that provided the common thread linking together plaintiffs' otherwise disparate and individualized claims. However, we agree with the district court that substantial limitations in the plaintiffs' statistical evidence rendered the form of proof wholly insufficient to show that any pattern or practice of discrimination disparately affected the plaintiffs' class, or, for that matter, that the defendants had a general policy of discrimination. *See Cooper*, 205 F.R.D. at 630. Moreover, the individual determinations on liability and damages necessary for the individual plaintiffs to succeed would require highly fact-specific inquiries concerning each plaintiff. Thus, we can discern no abuse of discretion in the district court's determination that the issues subject to individualized proof predominated over those that could be established with class-wide proof, and therefore that the Rule 23(b)(3) class action procedure would not be superior for the fair and efficient adjudication of the controversy.

III.

A.

Finally, we turn to the district court's orders granting summary judgment in favor of the defendants on the claims of each of the seven individual plaintiffs. We review the district court's orders granting summary judgment *de novo*, applying the same legal standards as the district court did and viewing all of the facts in the light most favorable to the non-moving party. *See, e.g., Johnson v. Booker. T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 507 (11th Cir. 2000). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (*quoting First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575, 1592, 20 L. Ed. 2d 569 (1968)). "All reasonable doubts about the facts should be resolved in favor of the non-movant." *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999) (*quoting Clemons v. Dougherty County*, 684 F.2d 1365, 1368-69 (11th Cir. 1982)).

B.

As we have observed, the plaintiffs claimed racial discrimination under three distinct Title VII theories: pattern and practice discrimination, disparate treatment

discrimination, and disparate impact discrimination. *See Joe's Stone Crab*, 220 F.3d at 1273. The first two theories require the plaintiffs to prove discriminatory intent; the third does not. *Id.* The plaintiffs also assert claims under Section 1981, which, unlike Title VII, only provides a cause of action for claims involving intentional discrimination. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391, 102 S. Ct. 3141, 3150, 73 L. Ed. 2d 835 (1982); *Brown*, 939 F.2d at 949.

The basic legal framework governing these theories is by now well-established. In a disparate treatment case, the plaintiff bears the burden of proving that the employer intentionally discriminated against him because of his race. *See Holifield v. Reno*, 115 F.3d 1555, 1565 (11th Cir. 1997). The plaintiff can establish discriminatory intent through either direct[15] or indirect evidence; to establish a *prima facie* case of intentional discrimination using circumstantial evidence, plaintiffs may use the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).[16]

---

[15] Direct evidence is evidence which itself proves the existence of discrimination and does not require inference or interpretation, as for example a frank admission from a manager that he refused to hire an applicant because he was black or because she was female. As would be expected, such direct evidence is encountered only infrequently, since direct evidence "is composed of only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of some impermissible factor." *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999) (citation and internal quotation marks omitted).

[16] The *McDonnell Douglas* framework for establishing a *prima facie* case is used in intentional discrimination cases brought under either Title VII or Section 1981. *Sledge v. Goodyear Dunlop Tires N.A., Ltd.*, 275 F.3d 1014, 1015 n.1 (11th Cir. 2001). Under *McDonnell Douglas*, a plaintiff may establish a *prima facie* case of discrimination in promotion by

(Continued on following page)

Again, in a "pattern and practice" disparate treatment case, "the plaintiff must prove, normally through a combination of statistics and anecdotes, that discrimination is the company's 'standard operating procedure.'" *Joe's Stone Crab*, 220 F.3d at 1274 (citation omitted). "To meet this burden of proof, a plaintiff must 'prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts. It has to establish by a preponderance of the evidence that . . . discrimination [is] . . . the regular rather than unusual practice.'" *Id.* at 1286-87 (*quoting Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 at 336, 52 L. Ed. 2d 396, 97 S. Ct. 1843 at 1843).

To state a claim under a disparate impact theory, in contrast, a plaintiff need not establish that he suffered intentional discrimination. Rather, "disparate impact theory prohibits neutral employment practices which, while non-discriminatory on their face, visit an adverse, disproportionate impact on a statutorily-protected group." *Id.* at 1274. We have noted that the disparate impact theory is "a doctrinal surrogate for eliminating unprovable acts of intentional discrimination hidden innocuously behind facially-neutral policies or practices." *Id.*

Thus, to state a *prima facie* case of disparate impact discrimination, a plaintiff must establish that (1) there is a significant statistical disparity among members of different racial groups; (2) there is a specific, facially-neutral employment policy or practice; and (3) there is a

---

establishing that (1) he belongs to a racial minority; (2) he was qualified for and applied for a position the employer was trying to fill; (3) he was denied the position; and (4) others who were not members of the protected class were hired, or the employer continued to seek applicants with the plaintiff's qualifications. 411 U.S. at 802, 93 S. Ct. at 1824.

causal nexus between the specific policy or practice and the statistical disparity. *Id* Moreover, in order to satisfy the third, critical requirement, a plaintiff "must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Id.* at 1274-75 (citation and internal quotation marks omitted).

In general terms, disparate impact cases are more amenable than other types of discrimination claims to class treatment, since they arise out of specific policies or practices that have a disproportionate impact on an entire class of employees. In contrast, when disparate treatment is the basis of a class action, it is generally more likely that individual issues will predominate and make proceeding in a class action format inappropriate. *See, e.g., Reyes v. Walt Disney World Co.*, 176 F.R.D. 654, 658 (M.D. Fla. 1998) (explaining that disparate treatment claims are inherently "highly individualized" and where employees worked in different divisions with different structures and decision makers, each plaintiff was subject to his "own set of unique circumstances surrounding the adverse employment action about which they now attempt to collectively complain").

In a discrimination action brought under either Title VII or Section 1981, a plaintiff must first establish a *prima facie* case of discrimination, which the defendant can rebut by offering a legitimate, non-discriminatory reason for the allegedly discriminatory act. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105 (2000). "In other words, the defendant must produce evidence that the plaintiff was rejected, or someone else was preferred, for a

legitimate, nondiscriminatory reason." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714, 103 S. Ct. 1478, 1481, 75 L. Ed. 2d 403 (1983) (citation and internal quotation marks omitted). "It is important to bear in mind . . . that the defendant's burden of rebuttal is exceedingly light. . . . At this stage of the inquiry, the defendant need not persuade the court that its proffered reasons are legitimate; the defendant's burden is merely one of production, not proof." *Perryman v. Johnson Prods. Co.*, 698 F.2d 1138, 1142 (11th Cir. 1983) (citation and internal quotation marks omitted).[17]

[17] The plaintiffs argue, however, that the *McDonnell Douglas* burden-shifting analysis applied to claims of employment discrimination was radically revised by the Supreme Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003). According to the plaintiffs, *Desert Palace* overruled *McDonnell Douglas* and its progeny, so that "once a plaintiff establishes a *prima facie* case of discrimination, a defendant may no longer simply articulate a legitimate, non-discriminatory reason for the adverse employment action, but rather must prove that it would have taken the same action absent the alleged discrimination." Appellants' January 9, 2004 Notice of Supplemental Authority at 1.

The plaintiffs read *Desert Palace* too broadly. While it is true that some courts have suggested that *Desert Palace* may spell the end of the *McDonnell Douglas* burden-shifting analysis, *see, e.g.*, *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987, 990-91 (D. Minn. 2003), the *Desert Palace* holding was expressly limited to the context of mixed-motive discrimination cases under 42 U.S.C. § 2000e-2(m). Indeed, the Court explained that it did not decide whether its analysis applied in other contexts. *Desert Palace*, 539 U.S. at 94 n.1, 123 S. Ct. at 2151 n.1. Moreover, the fact that the Court did not even mention *McDonnell Douglas* in *Desert Palace* makes us even more reluctant to believe that *Desert Palace* should be understood to overrule that seminal precedent. Finally, after *Desert Palace* was decided, this Court has continued to apply the *McDonnell Douglas* analysis in non-mixed-motive cases. *See, e.g.*, *Maynard v. Bd. of Regents*, 342 F.3d 1281, 1289-90 (11th Cir. 2003).

If the defendant successfully rebuts the plaintiff's *prima facie* case, "the presumption of discrimination is eliminated." *Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (*en banc*). To survive summary judgment, the plaintiff must then "come forward with evidence, including the previously produced evidence establishing the *prima facie* case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." *Id.* (*quoting Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997)); *see also Reeves*, 530 U.S. at 143, 120 S. Ct. at 2106; *Perryman*, 698 F.2d at 1142. To show that the employer's reasons were pretextual, the plaintiff must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538. "If the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim." *Chapman*, 229 F.3d at 1024-25; *see also Combs*, 106 F.3d at 1529 (explaining that the plaintiff must present "sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged action").

The plaintiffs argue that they have presented sufficient statistical evidence in support of their pattern and practice and disparate impact claims to raise genuine issues of material fact, and thus to defeat summary judgment. In contrast to the individual claims of disparate

treatment, which we address *infra*, the pattern and practice and disparate impact claims depend on the same body of statistical evidence. Accordingly, these claims stand or fall in concert.

As we have observed at some length, the statistical evidence consists primarily of two expert reports authored by Dr. Janice Madden. However, Dr. Madden's reports were not sufficiently tailored to compare similarly situated employees. They failed to effectively measure job-related skills, education, experience, and job performance, using only broad, imprecise measurements as proxies for work experience. Nor did the reports sufficiently narrow the classes of employees who were compared, instead using company-wide data that did not reliably identify discrimination within designated segments of the workforce. And, as we have observed, the reports did not distinguish between competitive and non-competitive promotions, did not capture in-grade progressive promotions and did not measure outcomes for employees who actually applied for promotions as opposed to those who did not.

After reviewing this body of statistical evidence, we agree with the district court that basic analytical deficiencies in the reports render them insufficient to support a conclusion that intentional discrimination was the defendants' standard operating procedure. Even if we accept all the calculations underlying Madden's reports as correct, the reports' conclusions are of very limited value because the data on which those calculations were based was not meaningfully tailored. That is, even crediting as true the conclusions, we do not believe that a jury reasonably could infer, based on the evidence, that the plaintiffs established a pattern and practice claim. Summary judgment was

therefore properly entered for the defendants as to the plaintiffs' discriminatory pattern and practice claims.

Moreover, the district court properly entered summary judgment for the defendants on the disparate impact claims. The plaintiffs say they identified a statistical disparity between white and black employees, along with a facially neutral employment practice – the use of subjective hiring criteria by the defendants – that has caused this disparity. First, however, a substantial question exists as to whether the plaintiffs' statistical evidence is sufficiently tailored to establish statistical disparities within the specific segments of the defendants' workforce in which the individual plaintiffs worked. *See, e.g., Maddox*, 764 F.2d at 1549-50. But even assuming that the plaintiffs had met this requirement, they have failed to demonstrate a causal nexus between any statistical disparities in the defendants' workforce and the practice of using partially subjective hiring criteria by some managers in some of the defendants' facilities. *See, e.g., Wards Cove Packing*, 490 U.S. at 651-55, 109 S. Ct. at 2121-24. Accordingly, the district court did not err in entering summary judgment for the defendants on the plaintiffs' disparate impact claims.

We turn, then, to the arguments mounted by each plaintiff concerning his or her disparate treatment claims.

C. Cornelius Cooper

Cooper asserts that the district court erred by entering final summary judgment in favor of the defendants on

his individual disparate treatment claims.[18] Specifically, Cooper argues that the district court erred in entering summary judgment against him as to the denial of two promotions in 1998, one to a Lighting Coordinator position and the other to a Trainer position.[19] Cooper also argues

[18] The district court granted summary judgment in favor of defendant SCES on the ground that Cooper had abandoned any claims against SCES, and in favor of TSC and SCS because Cooper was never an employee of these defendants. R301 at 1-2; *see Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998) (explaining that a plaintiff must be an employee to bring an employment discrimination lawsuit). As for GPC, the district court found that although Cooper had been an employee of that defendant, his claims failed for other reasons. While Cooper's arguments on appeal are phrased in terms of "the defendants" and "Southern" generally, in substance they are directed to the district court's analysis of his claims against GPC. To the extent that Cooper argues that TSC and/or SCS were "joint employers," we are unpersuaded and conclude that Cooper was an employee of GPC only. Accordingly, we affirm the district court's entry of summary judgment against Cooper and in favor of TSC, SCES, and SCS.

[19] In a notice of supplemental authority, the plaintiffs claim that under *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 158 L. Ed. 2d 645, 124 S. Ct. 1836 (2004), the district court erroneously applied a two-year statute of limitations to the plaintiffs' Section 1981 claims, thus barring claims based on events that occurred more than two years before this lawsuit was filed (for example, claims based on Cooper's being denied promotions more than two years before suit was filed). While it is true that the Supreme Court held in *Jones* that claims made possible by the amendment to Section 1981 in the Civil Rights Act of 1991 were governed by the four-year federal "catch-all" statute of limitations, the plaintiffs are barred from arguing that their claims are governed by a four-year limitations period because they have waived the issue. The plaintiffs did not argue in the district court, or, indeed, in their briefs submitted to this court that a four-year limitations period applied to their claims, and "parties cannot properly raise new issues at supplemental briefing, even if the issues arise based on the intervening decisions or new developments cited in the supplemental authority." *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000). As our case law makes clear, parties "must submit all issues on appeal in their

(Continued on following page)

that the district court erred in excluding an expert report which, he claims, would have established that it was highly unlikely that the selection process used to deny him his position was "race blind."

Cooper first says that he established pretext as to the denial of a Lighting Coordinator job within GPC's Lighting Services Business Unit ("LSBU"). Lighting Coordinators at GPC are involved in selling outdoor lighting systems and overseeing the installation and maintenance of these systems by outside contractors. Cooper was one of more than fifty applicants for two Lighting Coordinator positions posted on the defendants' JobNet system in 1998, but was denied an interview for the position. He established a *prima facie* case that the denial of the promotion was discriminatory, but the district court concluded he had failed to show that the legitimate, non-discriminatory reasons for GPC's denying him the promotion were pretextual.

We dispense first with Cooper's suggestion that statistical evidence found in the declaration of expert John Del Roccili raised a genuine issue of material fact concerning whether the interview selection process used by GPC was race blind. The district court excluded Del Roccili's declaration after finding that the plaintiffs had not properly identified Del Roccili as an expert or provided a

---

initial briefs. When new authority arises after a brief is filed, this circuit permits parties to submit supplemental authority on intervening decisions or new developments regarding issues already properly raised in the inital briefs." *Id.* (citations and internal quotation marks omitted) (final emphasis added); *see also United States v. Padilla-Reyes*, 247 F.3d 1158, 1164 (11th Cir. 2001) ("Because this issue is raised for the first time in supplemental briefing, we deem it waived.").

statement of his intended testimony, as required by Rule 26 of the Federal Rules of Civil Procedure. The district court also held that, to the extent the plaintiffs sought to use Del Roccili as a fact witness, his declaration was inadmissible because he lacked personal knowledge of the data about which he opined.

We review the district court's decision to exclude Del Roccili's declaration for abuse of discretion, *see Benson v. Tocco, Inc.*, 113 F.3d 1203, 1208 (11th Cir. 1997), and conclude that the district court clearly acted within its discretion here. Under Federal Rule of Civil Procedure 26, all parties must disclose expert opinion reports when directed by the court, or at least 90 days before trial. These reports must contain "a complete statement of all opinions to be expressed and the basis and reasons therefor." Fed. R. Civ. P. 26(a)(2)(B). Under Rule 37(c)(1) of the Federal Rules of Civil Procedure, a party "that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial . . . any witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1).

In this case, plaintiffs originally represented that Del Roccili was a fact witness, but later identified him as an expert witness in response to defendants' discovery requests. However, the plaintiffs never provided defendants with an expert report containing Del Roccili's opinions or, for that matter, the bases for his opinions, as required under Rule 26. Because the expert witness discovery rules are designed to allow both sides in a case to prepare their cases adequately and to prevent surprise, *see Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000), compliance with the requirements of Rule 26 is not merely aspirational.

Plaintiffs have identified Del Roccili as "an expert in extracting and analyzing data from human resources databases," R282 at 2, and in his declaration, Del Roccili extracted substantial data from the defendants' databases, performed statistical probability calculations, and expressed opinions about the significance of these calculations. While we do not evaluate the reliability of DelRoccili's opinions, the techniques utilized and opinions presented plainly require the kind of technical or specialized knowledge that is the hallmark of expert evidence. *See* Fed. R. Evid. 702. We therefore conclude that Del Roccili's declaration was properly construed as an expert report and, thus, because the plaintiffs failed to comply with the explicit requirements of Rule 26, it was within the sound discretion of the trial judge to sanction plaintiffs for their failure to disclose by enforcing the unambiguous terms of Rule 37(c). *See Firefighters' Inst. for Racial Equality ex rel. Anderson v. City of St. Louis*, 220 F.3d 898, 902 (8th Cir. 2000).

Cooper claims, however, that he has demonstrated pretext even in the absence of Del Roccili's declaration. We remain unpersuaded. It is undisputed that LSBU Sales Manager Mike Clay was responsible for choosing for interviews applicants who had applied for the Lighting Coordinator positions. After receiving more than 50 applications for the openings, Clay reviewed a computer-generated list of applicants, including a candidate profile listing each applicant's work history. Clay reviewed the applicant profiles and selected candidates to interview based on the following specific job-related criteria: applicants needed at least two years of experience in power delivery; demonstrated communication, leadership and teamwork skills; experience in contract administration

and contractor supervision; and experience as a foreman. Clay also considered applicants whom he knew personally, for whom he had received recommendations, and who had taken initiative by expressing specific interest in learning more about the Lighting Coordinator positions. Clay stated that he did not select Cooper for an interview because (1) Cooper lacked any experience as a foreman; (2) Cooper was not known personally to Clay; (3) Cooper had not been recommended; and (4) Cooper had not contacted Clay or other members of the LSBU regarding the positions.

Cooper contends that Clay's stated reliance on recommendations was pretextual. Because the JobNet posting did not require applicants to submit a recommendation, Cooper says that Clay's use of this non-posted requirement created an "informal, secretive and subjective . . . promotion decision process [which] tended to facilitate the consideration of impermissible criteria." *Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 798 (11th Cir. 1988). We are unpersuaded that Clay's use of applicant recommendations as one factor – among other, clearly job-related factors – in determining who would be interviewed was a pretext for a secretive, subjective, and discriminatory process. Moreover, GPC has offered evidence that one preferred qualification was that an applicant had previously served as foreman – a legitimate, job-related requirement – and Cooper had not served as a foreman. In short, Cooper has not shown that GPC's proffered, legitimate reasons for denying him an interview were "unworthy of credence." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207 (1981).

Cooper also claims that he was discriminated against on account of race when he was denied a non-union job as

a Trainer, and that he has raised a genuine question that the legitimate reasons provided for the denial of this job were also pretextual. Trainers work with line crew employees, instructing them on safety techniques and job-related skills through hands-on training. The defendants maintain that, in addition to requiring technical knowledge, the Trainer position requires significant communication skills, since Trainers must be able to teach their charges efficiently. The hiring manager in charge of filling the Trainer vacancies, Francis Howard, stated that he did not select Cooper because he believed Cooper did not possess superior communication skills, job knowledge, experience, teamwork skills, and peer credibility. Howard also said that he learned from other members of the Screening Committee that Cooper had experienced difficulty articulating training instructions to student employees when he served as a guest instructor at the Training Center. *See* R-204-2 at 10.

Cooper responds that he did have the necessary communication and other skills. However, the crucial question here is not whether Cooper fulfilled the requirements, but whether Howard honestly believed that Cooper did not meet the criteria. *See Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). Cooper does not dispute that some selection committee members told Howard that Cooper had trouble articulating instructions to trainees when he served as guest trainer. Nor has Cooper presented any evidence suggesting that Howard did not genuinely believe that Cooper did not posses the requisite job skills.

Moreover, Howard testified that he honestly believed Cooper did not have up-to-date job knowledge of overhead lines at the time trainers were hired. Howard drew this

conclusion because Cooper only had experience in underground cable repair during the two years preceding his Trainer application. Cooper says that because GPC was filling both overhead and underground Trainer positions, this reason is also pretextual. Again, however, Cooper has presented no evidence suggesting that Howard did not honestly believe a trainer required up-to-date knowledge of all line crew work, including overhead and underground cable repair.

Finally, Cooper challenges Howard's explanation that Cooper lacked peer credibility and teamwork skills. But here, again, Cooper's argument that he indeed possessed these attributes is wide of the mark: Cooper has offered no evidence that Howard did not honestly believe this. Short of some evidence that Howard did not genuinely believe the legitimate reasons, on this bare record we will not second-guess Howard's honest assessment of Cooper's qualifications. *See id.* ("Federal courts do not sit as a super-personnel department that reexamines an entity's business decisions. . . . Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior." (citation and internal quotation marks omitted)). "We do not ask whether the employer selected the 'most' qualified candidate, but only whether it selected the candidate based on an unlawful motive." *Denney v. City of Albany*, 247 F.3d 1172, 1188 (11th Cir. 2001) (citation omitted). And even if Cooper could discredit one of the reasons Howard offered for not hiring him, it would still not establish pretext, because to do so, Cooper would have to establish that each of Howard's reasons was pretextual. *See Chapman*, 229 F.3d at 1024-25 ("If the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant

employer's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim." (emphasis added)). This he has failed to do.

In short, because Cooper has not raised a genuine issue of material fact as to each of the legitimate reasons proffered for why he was not offered the Lighting Coordinator or Trainer position in 1998, the district court did not err in awarding GPC final summary judgment.

D. Michael Edwards

The plaintiff Edwards complained that he suffered discrimination when his managers at GPC denied him numerous promotions. On appeal, he alleges the district court erred in its review of the denial of four specific promotions for which he applied.[20] Edwards maintains that it was on account of race that GPC declined to offer him a promotion to a Cable Locator position in April 2000; to an Operator I job in March 2000; to an Operating Service Representative position in June 1999; and to a Power Delivery Supervisor position, also in 1999.[21] The

[20] Edwards argues repeatedly that "Southern" denied him various promotions; in actuality, managers at GPC declined to promote him. Because Edwards was never an employee of TSC, SCES, or SCS, we affirm the district court's grant of summary judgment in favor of these defendants. *See Llampallas*, 163 F.3d at 1242; *supra* note 18. The remainder of our analysis evaluates whether summary judgment was properly granted as to defendant GPC.

[21] Because Edwards only offers arguments related to the denial of these four specific promotions, he is deemed to have abandoned any claims concerning any other allegedly discriminatory denials of promotion. *See, e.g., Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 2004 WL 2113022, at *6 (11th Cir. 2004); *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003).

district court concluded that Edwards failed to show that the legitimate, non-discriminatory explanations offered for hiring other candidates were pretextual. We agree.

During his 13 years at GPC, Edwards worked in a range of different union positions, at a range of locations. Between 1987 and December 1990, Edwards served as Laborer in the Nuclear Operations area of a plant in Waynesboro, Georgia. After leaving that position, he served until July 1993 as a Line Crew Helper in Augusta, Georgia, before working as an Apprentice Lineman in Hinesville, Georgia until April 1996. Beginning at that time, Edwards worked as a Lineman based in Tucker, Georgia. While Edwards progressed through these various positions during his tenure at GPC, he complains that several promotions he sought in 1999 and 2000 were denied him on account of race.

We begin with GPC's decision not to offer him a Cable Locator position in April 2000. After suffering various injuries that interfered with his working as a Lineman – including a severe thumb injury and damage to his back – and after taking various medical leaves and light-duty assignments, Edwards received an assignment as a temporary cable locator in November 1999. In that capacity, Edwards reported to James Weldon, GPC's Cable Locating Manager, and was responsible for locating underground electrical cable while facilitating engineering, construction, and other projects. After working as a temporary Cable Locator for four or five months, Edwards applied for a full-time Cable Locator position in early April 2000.

Weldon was the hiring manager for the permanent Cable Locator position, and he chose seven individuals,

including Edwards, for interviews. Along with a Human Resources Representative who worked as a facilitator, Weldon assembled an interviewing panel that included, in addition to Weldon, a white woman, a white man, and a black man. The interview panel spoke with each of the seven applicants individually, rating their responses to six structured, job-related questions on a scale of 0 to 3. After all of the interviews were completed, the four interviewers ranked the applicants based on their "gut feel," and Edwards scored very highly. Subsequently, the scores assigned to each candidate, based on their answers to the six questions, were tallied. The top three candidates, based on these aggregate scores, were Jim Brown (69 points), Carey Rutledge (62.5 points), and the plaintiff Edwards (61 points). The committee then discussed the three "finalists." One of the interviewers explained that she had reservations about Edwards's job performance in his capacity as a temporary Cable Locator. She said she had frequently seen Edwards in the office socializing and speaking on the phone, while other employees were in the field. Moreover, she felt that Edwards had not performed well in his interview.

The committee recommended not offering the job to the most highly ranked applicant (Brown) because he had expressed doubt that he would accept the job even if it were offered to him. The members of the committee then agreed to recommend that the position be offered to Rutledge, whose aggregate interview score was slightly higher than that of Edwards. Rutledge had previous work experience related to the Cable Locator position, interviewed effectively, and was familiar with the equipment used in the position. Rutledge accepted the offer.

Edwards claims that the reasons GPC advances for offering the job to Rutledge must be pretextual because the hiring manager, Weldon, testified that Edwards was well qualified, because GPC only revealed the job-performance concerns of the committee member in its summary judgment motion, rather than at the earliest stages of discovery, and because Edwards was better qualified for the position than Rutledge.

The relevant issue here, however, is not whom we would determine to be better qualified for the job. *See Elrod*, 939 F.2d at 1470. Again, we do not sit in judgment of the wisdom of an employer's selection. Edwards "cannot . . . establish pretext simply by showing that [he] is more qualified than [Rutledge]. Rather, [Edwards] must adduce evidence that the disparity in qualifications is 'so apparent as virtually to jump off the page and slap you in the face.'" *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001) (*quoting Denney*, 247 F.3d at 1187); *see also Lee v. GTE Fla., Inc.*, 226 F.3d 1249, 1253-54 (11th Cir. 2000). This principle "should be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." *Lee*, 226 F.3d at 1254 (*quoting Deines v. Texas Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 280-81 (5th Cir. 1999)) (internal quotation marks omitted).

On this record, the evidence is insufficient to raise a genuine issue of fact as to whether GPC's stated reasons for promoting Rutledge instead of Edwards are pretextual. Edwards has not offered evidence showing that he was "so clearly more qualified for the position than [Rutledge] that a reasonable juror could infer discriminatory intent from

the comparison." *Id.* at 1255. Indisputably, Rutledge received a higher aggregate score than Edwards on his interview, Rutledge had relevant job experience and familiarity with the work required of a Cable Locator, and at least one committee member believed that Edwards had adopted an inappropriate demeanor during his interview and had questionable work habits. The evidence was not sufficient to show a disparity between Edwards's qualifications and Rutledge's so great that a jury could infer the committee did not honestly believe Rutledge was more qualified. *See id.*

Moreover, because the plaintiffs' Complaint listed only the Cable Locator position, the district court observed that Edwards was limited to pursuing only that claim. Out of "an abundance of caution," however, the district court addressed several other claims raised by Edwards. It need not have done so. Any claims not asserted in the plaintiff's Complaint are properly dismissed. *See Coon v. Ga. Pac. Corp.*, 829 F.2d 1563, 1568-71 (11th Cir. 1987).[22] Yet even if Edwards had included the remaining three promotion denials in the Complaint, summary judgment still would have been properly granted in favor of GPC, because Edwards did not establish pretext as to any of those employment decisions.

First, Edwards says that he was more qualified than the two white candidates who were offered Operator I

---

[22] Furthermore, several of the claims not included in the Complaint, but asserted in discovery, occurred more than 180 days before Edwards filed a complaint with the EEOC. Those claims were, therefore, barred by Title VII's statute of limitations. *See* 42 U.S.C. § 2000e-5(e)(1); *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 848 (11th Cir. 2000).

positions in March 2000, but he has failed to demonstrate a disparity between him and them so great that a fact-finder could infer discrimination from the decision not to promote. Moreover, some of the evidence Edwards relied upon is taken from performance evaluations completed after the successful applicants had already begun working in the Operator I positions. Isolated negative comments in these evaluations cannot support an inference that those charged with filling the openings declined Edwards's application because of race.

As for the Operating Service Representative promotion Edwards was denied in June 1999, Edwards claims that the district court erred by basing its decision on "inadmissible hearsay." Appellants' Brief at 69. The alleged hearsay was a statement by a member of the selection committee, David Keenum, that, to his knowledge, the hiring manager, Bob Davidson, chose the white candidate because he believed the white candidate was the best-qualified candidate for the position. Regardless of whether this statement is fairly characterized as hearsay, Edwards failed to present any evidence to challenge GPC's evidence that the successful candidate was hired based on his interview performance and extensive experience related to the position. The successful candidate, Gary E. Miller, was a long-term employee of GPC who had extensive experience in metering and power delivery. He was recommended by the interview committee as one of the most qualified candidates for the Operator Service Representative position Edwards had sought. Moreover, Edwards has not undermined GPC's evidence that his race was unknown during the selection process, rendering untenable the suggestion that he was denied the position because of his race.

Finally, Edwards has not established pretext concerning his failed application for the Power Delivery Supervisor position in February 1999. GPC maintains that Edwards was not selected for an interview because his application did not reflect familiarity with the repair shop operations or any mechanical background. In contrast, the successful candidate, Al R. Kuzava, was the consensus recommendation of the interview committee, having been deemed the most qualified for the position based on his extensive repair shop and mechanical experience, his substantial experience as a journeyman, and his demonstrated leadership skills, all job-related skills identified by the hiring manager, Mark Edward Cawthon, as prerequisites for the job. Our review of the record confirms that the successful candidate had extensive mechanical and repair shop experience, and that Edwards's application lacked any indication that he had familiarity with repair shop operations. Accordingly, Edwards has failed to cast doubt on the legitimate reasons proffered by GPC for denying him the Power Delivery Supervisor position.

In short, we find no reversible error in the decision to grant summary judgment in favor of GPC.

E. Charcella Green

Plaintiff Green contends that she was discriminated against as to both promotion and compensation, and she challenges the district court's entry of summary judgment against her on both claims.[23] We turn, first, to Green's

[23] Green's arguments on appeal are directed to "Southern" and "the defendants," but Green was specifically employed by GPC. Because Green was never an employee of TSC, SCES, or SCS, we again affirm the district court's grant of summary judgment in favor of these

(Continued on following page)

arguments concerning her promotion discrimination claim, stemming from the denial of a Manager of Education Services position in 1998.[24]

The district court determined that summary judgment was appropriate on Green's promotion claim because, having accrued more than two years before this lawsuit was filed, the claim was time-barred. Green maintains, however, that the district court erred in calculating when her promotion claim accrued. The district court also found that the claim failed on the merits. Because we agree that Green's promotion claim was time-barred, we need not reach the merits of her claim.

The district court applied a two-year statute of limitations to Green's Section 1981 promotion claim, determining that, to be timely, Green's claim had to accrue after July 28, 1998. *See* R-303 at 8 (citing *Hill v. Metro. Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1546 (11th Cir. 1988)). Green did not contest the applicability of this two-year statute of limitations before the district court or in the briefs submitted to this Court, and therefore has waived any challenge to the district court's use of a two-year limitations period. *See supra* note 19. The limitations period begins to run when the facts that will support a

---

defendants. *See Llampallas*, 163 F.3d at 1242; *supra* note 18. The remainder of our analysis is directed to whether summary judgment was properly granted to defendant GPC.

[24] Green offers no arguments as to the entry of summary judgment against her on her claims relating to bonuses or promotions other than the Manager of Education Services position. Accordingly, she is deemed to have abandoned any claims other than those based on compensation and the denial of the education manager position. *See, e.g., Access Now*, 385 F.3d at ___, 2004 WL 2113022, at *6; *Jernigan*, 341 F.3d at 1283 n.8.

claim are apparent, or should be apparent to a person with a reasonably prudent regard for her rights. *See Everett v. Cobb County Sch. Dist.*, 138 F.3d 1407, 1410 (11th Cir. 1998). Therefore, if Green knew or should have known before July 28, 1998 that she had been denied the Manager of Education Services position because of race, her promotion claim was time-barred.

As the district court noted, Green's deposition testimony reveals that she learned in early July 1998 that the educational manager position she had applied for had been given to Pamela Thomas, a white employee. When deposed, Green stated that the position had been filled "either toward the end of June or the first part of July [1998]." R137-R at 254. Green testified that she received a voice mail stating that Ms. Thomas had been hired "about two days" before a performance review that was held on July 15, 1998. *Id.* at 180-82. Green also testified that shortly after finding out Ms. Thomas had been hired, she expressed her concern about not being given the position to administrators at GPC, including the administrators conducting her performance review on July 15, 1998. *Id.* Moreover, Green stated that when she applied for the opening she knew she was the most qualified person for the job, indicating her belief that the successful candidate was, in fact, less qualified. In her deposition, Green also stated that she began to suspect she was a victim of racial discrimination as early as 1996. The two-year limitations period ended at the latest in mid-July 2000, some two weeks before this suit was commenced. Thus, the trial court properly determined that the promotion claim was time-barred.

Green also argues that the district court erred by entering a final order of summary judgment against her on

the compensation claims. Green says she was discriminated against on account of race in that she was paid less than white coworkers who performed similar jobs. To state a *prima facie* case of intentional discrimination in compensation, a plaintiff must establish that (1) she belongs to a racial minority; (2) she received low wages; (3) similarly situated comparators outside the protected class received higher compensation; and (4) she was qualified to receive the higher wage. *See Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1528 (11th Cir. 1992) (compensation discrimination by gender); *MacPherson v. Univ. of Montevallo*, 922 F.2d 766, 774 (11th Cir. 1991) (compensation discrimination by age). The comparators must perform jobs similar to the plaintiff's; thus, the plaintiff must show that, in her job, she "shared the same type of tasks" as the comparators. *B&B Cash Grocery*, 975 F.2d at 1529.

It is undisputed that Green began working for GPC as an intern in 1983, later becoming a full-time, regular employee and continuing at GPC for several years. In October 1996, while Green was working at GPC's Shenandoah Center, an environmental education center, GPC underwent a corporate restructuring that closed the Shenandoah enter. Green was then transferred to GPC's Community and Economic Development Department ("CEDD"), where she claims she began suffering discrimination in compensation.

After the 1996 corporate restructuring, Green accepted a position as an Education Advisor within the CEDD. She claims she was compensated on less favorable terms than white colleagues who served as Urban Advisors or Community Advisors, positions that Green claims are equivalent to Education Advisor. Indeed, Urban, Community, and Education Advisors are all classified

within the defendants' employment database as "ADO Advisors," but GPC asserts that Urban and Community Advisors are not appropriate comparators because the jobs they perform are notably different from those of Education Advisors. GPC relies on this distinction because it is undisputed that white Community and Urban Advisors are compensated more generously than is Green.

GPC Vice President Rebecca Blalock and CEDD administrator Lamar Norton testified that, during GPC's corporate restructuring, pay grade ranges were set by performing a market review to compare new positions to similar positions in the region. According to Blalock, this survey revealed that the market value of Education Advisors was less than that of Community and Urban Advisors within the CEDD, leading GPC to classify Education Advisors at pay grades E3 to E5, but Community and Urban Advisors at grades E5 to E7. GPC maintains that this distinction justifies the lesser salaries for Green and other Education Services employees, as compared to the Community and Urban Advisors.[25]

There is a substantial question whether Green has established a *prima facie* case of compensation discrimination, because it is not clear that the Community and

[25] Green introduced evidence of a 1996 market survey, the "Hay survey," which she alleges is the survey GPC relied upon in assigning salary grades to the various positions within the CEDD. Because this survey does not mention any ADO Advisor positions, Green maintains that GPC's alleged reliance on a market survey is not credible, and thus that the proffered justification is pretextual. However, the Hay survey was conducted after Green's salary was fixed, and could not have been the survey upon which GPC relied. Indeed, Blalock testified that this was not the survey used in setting the salary grades for Green and her colleagues in the CEDD.

Urban Advisors Green uses as comparators are similarly situated in all relevant respects. *See MacPherson*, 922 F.2d at 774 n.16 ("In a comparator analysis, the plaintiff is matched with a person or persons who have very similar job-related characteristics and who are in a similar situation to determine if the plaintiff has been treated differently than others who are similar to him." (emphasis added)). Even assuming, however, that the different Advisors are proper comparators, *see B&B Cash Grocery*, 975 F.2d at 1529, Green has not established that the legitimate reason advanced by GPC for the pay disparity is really a pretext for race discrimination. Green has not demonstrated that GPC's stated reliance on a market survey to classify Education Advisors' salary levels was false or otherwise shown that race discrimination motivated the salary structure. Indeed, when GPC classified Education Advisors in the E3 to E5 pay grade range, all Education Advisors were so classified – including Green and at least two white colleagues.[26] The fact that Green's two white colleagues were paid according to the same scale undermines Green's pretext argument.

In short, as to her compensation claim, Green has failed to introduce sufficient evidence to raise a material question on the issue of pretext.

---

[26] In fact, Green was classified at grade E5, the highest possible grade for the Education Advisor position. When Green transferred to the CEDD as an Education Advisor, she retained the E5 grade from her previous position. In contrast, her former supervisor, John Thrasher (a white employee), who also became an Education Advisor after the restructuring, accepted a demotion and salary grade reduction by two levels to retain his employment at GPC. In 1997, Thrasher was transferred from the Education Advisor position to a Community Advisor position.

F. Patricia Harris

P. Harris argues that the district court erroneously entered summary judgment against her on her Section 1981 claim of discrimination in compensation.[27] The district court concluded that, while P. Harris had established a *prima facie* case of compensation discrimination, she failed to raise an issue of fact concerning the legitimate reasons the defendants offered to explain the differences in her salary and those of her white colleagues. We agree.

P. Harris began working for GPC in June 1990, when she was offered a Secretary III position on a contract basis. She became a full-time, regular GPC employee on July 1, 1991, when she accepted a Senior Secretary position. Between 1993 and 1997, P. Harris worked for GPC as a Research Analyst in the Competitve Intelligence Department, before taking a job as an Economic Development Analyst in the Economic Research Department.

In the summer of 1997, P. Harris applied for a position as Market Research and Support Analyst in the Atlanta, Georgia offices of SCS. She contends that she was discriminated against when, on account of race, her manager at SCS set her salary at an artificially low level as compared

---

[27] P. Harris offers no arguments relating to the district court's entry of summary judgment against her on her promotion and training and support claims. As a result, she is deemed to have abandoned all claims other than her Section 1981 compensation claim. *See, e.g., Access Now*, 385 F.3d at ___, 2004 WL 2113022, at *6; *Jernigan*, 341 F.3d at 1283 n.8.

with salaries of white colleagues performing similar work.[28]

When P. Harris interviewed for the Analyst position at SCS, she met with an interview committee and also had an individual meeting with the Marketing Research Department's manager, Charles Plunkett. Because P. Harris lacked education or experience in marketing, the interview committee recommended against hiring her; Plunkett, however, overrode the committee's recommendation and chose to offer P. Harris the Analyst position. Plunkett testified that, owing to P Harris's lack of experience and marketing education, he would ordinarily have offered her an entry level position as a Market Research and Support Analyst II. However, based on P. Harris' salary grade at GPC, hiring her as an Analyst II would have precluded giving her a raise, presumably one reason she had desired to transfer to SCS. As a result, Plunkett chose to select P. Harris as an Analyst I, placing her in a higher salary grade than her position at GPC. In doing so, Plunkett awarded P. Harris an 8% raise in this new position, which was his understanding of the maximum pay increase that an employee transferring from GPC could receive.[29] P. Harris continued to

---

[28] Because P. Harris was never an employee of TSC or SCES, and was no longer an employee of GPC during the timeframe relevant to this appeal, we affirm the district court's grant of summary judgment in favor of these defendants. *See Llampallas*, 163 F.3d at 1242; *supra* note 18. The remainder of our analysis evaluates whether summary judgment was properly granted with respect to defendant SCS.

[29] The 8% raise P. Harris received brought her salary from $ 39,432 annually to $ 42,587 annually. Notably, P. Harris never questioned this figure, asked for a higher salary, or gave Plunkett any reasons why her compensation should be more favorable.

receive substantial salary raises during her tenure at SCS.[30]

In spite of the raises she received, P. Harris maintains that she suffered discrimination in compensation in that her salary still was lower than those paid to white co-workers performing the same tasks. The district court concluded that three white employees were valid comparators: John Page, Darin Klein, and Rebekah Golden. All three employees were paid higher salaries than P. Harris, and we agree with the district court that P. Harris successfully established a *prima facie* case of compensation discrimination. However, SCS offered legitimate, non-discriminatory explanations for the pay disparities – that P. Harris did not have either the professional experience or formal education of Page, Klein, and Golden, could not therefore perform her job as efficiently or independently, and was thus less valuable to the department. The district court concluded that P. Harris had failed to rebut these reasons and had not established that the proffered reasons were pretext.

On appeal, P. Harris contends that the district court erred because she had, in fact, established pretext as to Page and Golden.[31] However, on this record we cannot find "such weaknesses, implausibilities, inconsistencies,

[30] For example, less than a year after her promotion to the Analyst I position at SCS, P. Harris received a 4.2% merit raise. A year later, in March 1999, she received a 4.9% raise. In addition, P. Harris received the highest percentage incentive bonus in her department, 15%.

[31] Apparently conceding that the superior qualifications of Klein provided a legitimate, non-discriminatory reason for Klein's higher salary, P. Harris offers no argument on appeal using Klein as a comparator. Indeed, Klein possesses master's and doctorate degrees from the University of Pennsylvania, specializes in communications and research, and had professional experience in market research.

inco-herencies, or contradictions in [SCS's] proferred legitimate reasons . . . that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538 (citation and internal quotation marks omitted). P. Harris's own contention that she was equally qualified and experienced does not create an issue of fact.

P. Harris holds a master of business administration degree from the DeVry Institute and had worked for GPC for six years prior to taking the Analyst I position at SCS; she maintains that she gained relevant marketing experience at GPC. Golden possessed a bachelor's degree and had six years of market research experience before joining SCS, in which she held marketing positions including Project Director of Marketing, Supervisor of Marketing Research, and Marketing Research Coordinator for Cox Communications. Page had limited work experience, having worked as a Market Research Management intern with BellSouth Communications for six months, but held a bachelor's degree in business and marketing as well as a master's degree in marketing research from the University of Georgia, one of only a few universities to offer an advanced degree in market research.

Both Golden and Page were external hires, unlike P. Harris, who was an internal transfer from GPC. Plunkett testified that he considered different criteria in hiring Golden and Page, who were hired in tight labor markets in which new employees could command more competitive compensation packages. According to Plunkett, when Golden was hired, her extensive marketing experience allowed her to perform more efficiently than P. Harris; Golden was able to work with minimal supervision and was given more responsibility than P. Harris.

Similarly, while Page lacked Golden's extensive experience, Plunkett testified that Page's training at the University of Georgia made him well-prepared to take on extensive market research tasks. Plunkett also stated that he believed a candidate with Page's education could develop more rapidly than an employee like P. Harris, who lacked the training, and could also help SCS attract additional graduates from the University of Georgia's graduate program in Market Research. According to Plunkett, Page's valuable educational experience allowed him to work independently and take on significant responsibilities.

The plaintiff contends that her master's degree from the DeVry Institute and six years of marketing experience at SCS, much of which was spent effectively in on-the-job training, were equivalent to the qualifications of Page and Golden. However, Plunkett offered legitimate explanations for why the educational and work experiences of Page and Golden were more valuable to him as their manager.

P. Harris's assertion that she deserved to earn the same salary as these employees does not render Plunkett's stated explanations unworthy of credence or otherwise raise any genuine issue of fact. As we have observed, we do not "sit as a super-personnel department that reexamines an entity's business decisions." *Elrod,* 939 F.2d at 1470 (citation and internal quotation marks omitted). In the absence of any other evidence that Plunkett's compensation decisions were motivated by race, we conclude that the district court did not err in granting summary judgment in favor of SCS.

G. Sarah Jean Harris

S.J. Harris also claims that the district court erred by granting summary judgment for the defendants on her claims of discrimination in compensation and unlawful retaliation.[32] The district court concluded that because of S.J. Harris's unique disciplinary history, the comparators she used to establish a *prima facie* case of compensation discrimination were not similarly situated, and that even if S.J. Harris had been able to establish a *prima facie* case, she failed to show that the proffered legitimate reasons for her compensation were pretextual. The district court also determined that S.J. Harris failed to show pretext as to the legitimate reason offered to explain her termination: that she was fired because, while on disciplinary probation, her job performance deteriorated and she falsified a company document. But Harris contends that a material issue of fact still remains as to whether the proffered reasons were a pretext for racial discrimination.

GPC hired S.J. Harris as a General Clerk in 1979, and her employment was terminated on August 24, 2000, approximately a month after this case was filed.[33] From 1997 until her firing, S.J. Harris worked in Duluth, Georgia as a Region Support Representative, a customer

---

[32] S.J. Harris offers no argument on appeal relating to her promotion discrimination claim, and is therefore deemed to have abandoned any promotion claims. *See, e.g., Access Now*, 385 F.3d at ___, 2004 WL 2113022, at *6; *Jernigan*, 341 F.3d at 1283 n.8.

[33] S.J. Harris was never employed by, nor did she ever apply for a position with defendants TSC, SCES, or SCS. Accordingly, we affirm the district court's grant of summary judgment in favor of these defendants. *See Llampallas*, 163 F.3d at 1242; *supra* note 18. The remainder of our analysis is directed to whether summary judgment was properly granted to defendant GPC.

service position in GPC's Gwinnett Region. It is undisputed that, while she held this position, S.J. Harris received poor performance evaluations and was eventually subjected to formal discipline. In evaluating S.J. Harris's job performance in 1997, her supervisor, Hugh Walters ("Walters"), noted concerns relating to S.J. Harris's personal use of the telephone, as well as her punctuality, cooperation, teamwork, and communications with coworkers. Similar concerns were also expressed in S.J. Harris's evaluation for 1998, and S.J. Harris received ratings of "Unsatisfactory" or "Needs Improvement" in all categories on her mid-year 1999 evaluation.

Because of concerns about her job performance, S.J. Harris was placed in GPC's Positive Discipline program in mid-1999. GPC's disciplinary program prescribed formal processes designed to improve employee performance: at level one, S.J. Harris received the "Oral Reminder" about her work goals, and at level two she received the "Written Reminder" laying out the improvements she needed to make. When her job performance did not show sufficient improvement, S.J. Harris was placed in the final level of discipline, the "Decision-Making Leave" ("DML"). S.J. Harris's placement on DML occurred on October 7, 1999, at which time she was given a day off to decide whether she wished to leave GPC, or to return and redouble her efforts to improve her job performance. GPC employees placed on DML status are informed that if any disciplinary action occurs within 18 months after placement on DML, then the employee will likely be fired.

After returning to work, S.J. Harris showed some improvement in her performance during the later part of 1999 and the first months of 2000. However, GPC has offered uncontroverted evidence that in July and August

2000, Walters received complaints about S.J. Harris both from customers and co-workers, including complaints that her personal telephone usage had again increased, and that she was not completing assignments in a timely fashion. In addition, Walters received several complaints about delays for service orders that S.J. Harris oversaw. The plaintiff has not offered any evidence challenging GPC's assertion that much of her work in this time period suffered from various errors.

S.J. Harris argues, however, that this evidence must be pretextual, because an evaluation she received just before her termination in August 2000 failed to refer to these performance issues. Indeed, GPC acknowledges that S.J. Harris's performance improved somewhat in late 1999 and during the first part of 2000. But the problems that GPC maintains led to Harris's firing occurred in July and August 2000, while the performance evaluation covered only the period from January to June 2000, thus explaining why the disciplinary issues of July and August were absent from the evaluation.

According to GPC, the event that actually precipitated the firing occured in late August 2000. On August 22, 2000, Walters learned that an engineer, Keith Thomas ("Thomas"), received a work order from S.J. Harris that day, which Thomas believed had originally been filed with S.J. Harris on August 16, 2000. After speaking with Thomas and his supervisor, Walters concluded that S.J. Harris had falsified a computer entry to make it appear as if she had given Thomas a work order on August 16th, when in fact she had failed to do so until August 22nd. Walters conferred with other administrators and concluded that because of S.J. Harris's DML status, the decline in her performance in the summer of 2000, and her

falsification of the computer entry, her employment should be terminated. S.J. Harris was fired on August 24, 2000.

We turn, first, to S.J. Harris's argument that the district court erred by entering summary judgment for GPC on her retaliation claim. To establish a *prima facie* showing of retaliation under Title VII, "the plaintiff must show (1) that she engaged in statutorily protected expression; (2) that she suffered an adverse employment action; and (3) that there is some causal relation between the two events." *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994).

Here, the first two elements are not in dispute, and S.J. Harris established a *prima facie* case of retaliation because the delay between the filing of the lawsuit and her firing was so brief. *See Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 590 (11th Cir. 2000) (explaining that "close temporal proximity" may be sufficient to establish causal relation in retaliation cases). However, GPC may rebut the *prima facie* case by offering a legitimate, non-discriminatory reason for S.J. Harris's termination. GPC has done so by maintaining that S.J. Harris was fired because of the speedy and substantial decline in her job performance during the late summer of 2000, and because of her manager's good-faith belief that she had falsified a computer entry.

After review of the record, we are satisfied that the district court properly concluded that Walters honestly believed Harris had falsified the record. The relevant issue here is not whether Harris actually falsified the entry, but rather whether Walters honestly believed Harris falsified the entry. *See Elrod*, 939 F.2d at 1470; *E.E.O.C. v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000). The

record reflects that on August 22, 2000, S.J. Harris printed a service order and provided it to Thomas. On the same day, she made a computer entry stating that she had given the order to Thomas on August 16, 2000. GPC introduced evidence that Walters conferred with Thomas and his supervisor about the incident, examined the document in question, and honestly believed S.J. Harris had falsified the document. Because she was in the final stage of disciplinary probation and had been the subject of numerous complaints, S.J. Harris was terminated for this incident. She has introduced nothing to rebut this evidence, and therefore, she has not raised a genuine issue as to pretext. Accordingly, we discern no error in the district court's grant of summary judgment on the retaliation claim.

Next, S.J. Harris claims that she was discriminated against in compensation in that she was paid less than white employees in similar positions. Notably, S.J. Harris does not dispute that her disciplinary record was distinguishable from those of the alleged comparators she identifies. Indeed, from 1997 to 1999, and again in July and August 2000, S.J. Harris had a demonstrably poor job performance. S.J. Harris does not dispute that her performance evaluations were negative, or that she was disciplined in 1997 and 1998 for making excessive personal phone calls and habitual tardiness. Moreover, in 1998, two of S.J. Harris's job responsibilities were withdrawn because of performance issues, and in her 1999 evaluation, S.J. Harris's supervisor noted that she remained unable to return from lunch on time and continued making too many personal calls.

In spite of her disciplinary history, S.J. Harris alleges discrimination in that she was paid less than co-workers

Barron and Collett. But these comparators had no record of disciplinary problems. Neither was placed in GPC's Positive Discipline program, let alone on DML status. In fact, S.J. Harris was the only Customer Service employee in the Gwinnett Region to be placed on DML status. GPC's annual merit pay increases and bonuses are related to performance, and the difference in performance evaluations between Harris and Barron and Collett renders the latter two inappropriate comparators. *See MacPherson*, 922 F.2d at 774 n.16. Finally, Collett worked as an Operating Assistant, a job one level higher than S.J. Harris's, further diminishing her value as a comparator. Again, the district court did not err in entering summary judgment against S.J. Harris on her compensation claim. *See Jones v. Bessemer Carraway Med. Ctr.*, 137 F.3d 1306, 1313 (individuals lacking disciplinary and performance issues of plaintiff were inappropriate comparators), superseded in other part by 151 F.3d 1321 (11th Cir. 1998).

H. Irene McCullers

McCullers contends on appeal that the entry of summary judgment in favor of the defendants on her promotion and compensation claims was error. McCullers maintains that she established a *prima facie* case of discrimination in promotions and compensation and raised a genuine issue of material fact as to whether the defendants' stated justifications were pretextual. Specifically, McCullers claims that she was discriminated against by being denied a progressive promotion from Processing Operator I to Processing Operator Senior, and that she was paid less than similarly situated white co-workers.

McCullers began working as a file clerk for GPC in 1978, and transferred to SCS in January 1997.[34] When McCullers first transferred to SCS, she received the job title of Computer Operator I. At SCS, McCullers worked with, among others, three white colleagues, Mildred Brune ("Brune"), Shirley Keen ("Keen"), and Faye Starbird ("Starbird"). Brune, Keen and Starbird all had at least six more years of experience inside the defendant companies than did McCullers.

When the department in which McCullers and her white colleagues worked was reorganized in 1999, McCullers's job title was changed to Processing Operator I. Brune and Keen were also reclassified as Processing Operators I, while Starbird's job title was changed to Processing Operator II. In May 1999, Starbird was promoted to Processing Operator I, and in March 2000, Brune was promoted to Processing Operator Senior. McCullers was

---

[34] McCullers was never employed by, nor did she ever apply for a position with defendants TSC or SCES. Accordingly, we affirm the district court's grant of summary judgment in favor of these defendants. *See Llampallas*, 163 F.3d at 1242; *supra* note 18.

In addition, while McCullers did work for GPC between 1978 and January 1997, her employment at GPC occurred more than two years prior to the filing of this lawsuit. As we have explained, *see supra* note 19, the district court applied a two-year statute of limitations to the plaintiffs' claims, and because McCullers did not raise any objection to the two-year limitations period applied by the district court below or in her initial briefs, she is deemed to have waived any argument that a longer limitations period applies. *See Padilla-Reyes*, 247 F.3d at 1164 ("Because this issue is raised for the first time in supplemental briefing, we deem it waived."). Accordingly, we affirm the district court's grant of summary judgment in favor of defendant GPC. The remainder of our analysis relating to McCullers's claims, therefore, is devoted to the final summary judgment entered in favor of defendant SCS.

never promoted from Processing Operator I to Processing Operator Senior.

McCullers alleges that she was discriminated against in promotions when SCS refused to promote her to Processing Operator Senior, as it did with Brune. SCS responds that McCullers was less qualified for the promotion than was Brune. SCS maintains that Brune's work performance consistently exceeded expectations, while McCullers's did not, in large part because of problems with work attendance and tardiness. McCullers also contends that she was discriminated against in compensation in that she was paid less than Brune, Keen, and Starbird. SCS argues, in turn, that McCullers was paid less than these co-workers because McCullers lacked the seniority of her colleagues.

We turn first to McCullers's claim of promotion discrimination. The district court concluded that McCullers had failed to establish a *prima facie* case of promotion discrimination because she had not established elements two or four of the appropriate test, which required McCullers to prove that (1) she was a member of a protected class; (2) she applied for and was qualified for a promotion; (3) she was denied the promotion; and (4) a similarly situated white employee instead received the promotion. *See, e.g., Denney*, 247 F.3d at 1183; *Lee*, 226 F.3d at 1253; *Taylor v. Runyon*, 175 F.3d 861, 866 (11th Cir. 1999).

McCullers argues that the district court erred by misconstruing the fourth element of the *Denney* test for discrimination in promotion. McCullers contends that the district court erroneously required McCullers to show that a similarly situated white employee was promoted over

McCullers specifically, and that this ruling was wrong "because no 'promotion over the plaintiff' requirement exists" under *Denney*. Appellants' Brief at 51. First, *Denney* did not involve a non-competitive (progressive) promotion like the one that McCullers was denied, and the district court also cited *Harris v. Secretary, U.S. Department of the Army*, 119 F.3d 1313, 1321 (8th Cir. 1997), a case that did involve a progressive promotion like the one at issue for McCullers. But we need not determine whether the district court's gloss on the fourth element under *Denney* was inaccurate, since we agree with the district court that McCullers failed to establish the second element – that she was qualified for the promotion in question.

The record demonstrates that promotion from Processing Operator I to Processing Operator Senior required an employee's performance to consistently meet and exceed expectations. McCullers contends that during the relevant period, SCS consistently ranked her job performance as a four, on a five-point scale, and that this ranking indicates that she met and exceeded expectations. However, McCullers's personal opinion that being ranked as a four meant she exceeded expectations is insufficient to establish her qualification. *See Holifield*, 115 F.3d at 1564 (explaining that a plaintiff's "opinion, without more, is not enough to establish a *prima facie* case").[35]

---

[35] Moreover, even the document that McCullers relies on to establish that a four ranking demonstrates her qualification undercuts her case: this document states that employees in the fourth category "consistently meet and frequently exceed[ ] . . . expectations," while it is only employees in the fifth category who "consistently exceed[ ] performance objectives." R262-18. As the district court observed, McCullers "has never met Defendants' job assessment criterion of 'meets and

(Continued on following page)

Indeed, in contrast to McCullers's own self-assessment, her managers have maintained that her performance "was viewed as average – she was not a consistently strong performer – she did not consistently perform at a level that met and exceeded the expectations of her job." R200 at 11; *see also id.* at 21.[36] The only evidence McCullers has proffered to support her qualification is her own opinion, while all the other record evidence supports SCS's position that McCullers was not qualified for the promotion to Processing Operator Senior. The district court did not err in concluding that McCullers had failed to establish a *prima facie* case of promotion discrimination.

As for McCullers's compensation claim, the district court determined that McCullers failed to establish a *prima facie* case of discrimination because she did not identify a proper comparator. The three employees McCullers argues are valid comparators – Starbird, Brune and Keen – all had more than six years of seniority over McCullers. Seniority may constitute a legitimate, non-discriminatory justification for differences in compensation. *See, e.g., Irby v. Bittick*, 44 F.3d 949, 956 & n.10 (11th

---

exceeds expectations' although she has always been found to 'meet expectations.' Under Defendant's policy, this is not enough for a progressive promotion." R300 at 14.

[36] Indeed, the defendants have submitted multiple exhibits – including performance assessments, employee development materials, and skills assessments – which identify various areas in which McCullers's managers felt she needed improvement. Her managers expressed concerns regarding McCullers's work habits, including long lunches, arriving to work late, and taking excessive sick time, and generally rated her skills in the middle, rather than the upper, range of the assessment scale. *See, e.g.*, R137-96; R137-100; R137-105; R137-112; R137-118.

Cir. 1995); *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 599 (11th Cir. 1994). Because McCullers failed to identify any comparators with similar levels of seniority, she has failed to establish a *prima facie* case of discrimination in compensation. The district court did not err in entering summary judgment against McCullers.

I. Carolyn Wilson

Finally, the plaintiff Wilson argues that the district court erred in granting summary judgment for the defendants on her promotion and discrimination claims. Wilson maintains that the court erred by determining that she had failed to show that the proffered legitimate, non-discriminatory reasons for denying Wilson a promotion were pretextual. Wilson also finds error in the district court's conclusion that she failed to make a *prima facie* case of compensation discrimination because she did not identify any proper comparators.

Wilson began working for GPC in 1985, but in late 1997, she applied for and received a position within the Finance Center of SCES in Atlanta.[37] Wilson began working in this position in February 1998. The hiring manager for the opening at SCES, Karla Fuller ("Fuller"), listed a descriptive job title of the position as "Finance Center

[37] Wilson was never employed by, nor did she ever apply for a position with defendants TSC or SCS. Accordingly, we affirm the district court's grant of summary judgment in favor of these defendants. *See Llampallas*, 163 F.3d at 1242; *supra* note 18. Moreover, while Wilson did work for GPC for a dozen years, her employment at GPC ended before the statutory period relevant to this lawsuit. Accordingly, we affirm the district court's grant of summary judgment in favor of defendant GPC. The remainder of our analysis is devoted to the summary judgment entered in favor of defendant SCES.

Supervisor," although the offer letter Wilson received referred to the job as "Project Analyst Senior," an exempt level two position. Wilson's job performance in the Finance Center Supervisor merited several raises: she received percentage increases in salary in November 1998, March 1999, and March 2000, and also repeatedly received incentive awards and bonuses of as much as 20% of her salary.

In November 1999, Wilson applied for a position as Business Analyst II with SCES. Fuller was the hiring manager for this position, too, and the successful candidate would be supervised by Fuller as well. The preferred qualifications for the Business Analyst II position included the ability to start the job with minimal training and supervision; a bachelor's degree in finance, management, or accounting; experience in the construction industry; good oral and written communications ability; and familiarity with the Excel software program. Although Wilson did not have experience in construction or the preferred type of bachelor's degree, Fuller nevertheless selected Wilson for an interview.

Although Fuller interviewed Wilson for the Business Analyst II position, the job was ultimately offered to a white woman, Sarah McFall. Fuller suggested that both Wilson and McFall were qualified for the Business Analyst II job, but McFall had a bachelor's degree in accounting, unlike Wilson, and had limited work experience in the construction industry, again unlike Wilson. SCES maintains that Fuller – as the hiring manager and supervisor for the position – honestly believed that McFall was better qualified for the job than Wilson and would be able to perform with little training or supervision.

As the district court concluded, Wilson successfully established a *prima facie* case of promotion discrimination by proving that she was qualified for the promotion and that the position was offered to McFall, a white woman. *See, e.g., Denney*, 247 F.3d at 1183; *Lee*, 226 F.3d at 1253. However, the district court also concluded that Wilson had not established pretext as to the legitimate reason proffered to explain denying Wilson the promotion – that Fuller, the hiring manager, sincerely believed that McFall was better qualified.

Wilson's essential argument as to Fuller's conclusion that McFall had superior qualifications is that the asserted belief must be pretextual, because Wilson herself believes she was better qualified. But whether we could conclude Wilson was better qualified than McFall is not the issue here. *See Elrod*, 939 F.2d at 1470. As we have already explained, a plaintiff cannot establish pretext simply by showing that she is more qualified than the successful applicant. Rather, for Wilson to establish pretext, she would have to "adduce evidence that the disparity in qualifications is 'so apparent as virtually to jump off the page and slap you in the face.'" *Cofield*, 267 F.3d at 1268 (*quoting Denney*, 247 F.3d at 1187). It is undisputed that Wilson lacked the educational credentials that McFall possessed, and that, unlike Wilson, McFall had at least minimal construction industry experience.

As the supervisor and hiring manager for the vacant Business Analyst II position, Karla Fuller was in a unique position to determine that McFall was better qualified, since Fuller knew the specific job requirements of the position, had supervised Wilson, and was intimately familiar with Wilson's skills and qualifications. On this

record, we cannot say that any disparity in qualifications rises to the necessary level of obviousness.

As for Wilson's compensation claim, the district court concluded that summary judgment was appropriate because Wilson failed to establish a *prima facie* case. Specifically, Wilson failed to identify a similarly situated comparator. On appeal, Wilson asserts not only that she was paid less than similarly situated white employees, but also that white employees occupying "lower" positions were paid more generously. However, Wilson has not established that the proposed comparators had similar levels of experience or education, nor has she established the comparators' job responsiblities with any particularity. Wilson's assertion that these individuals were "lower" employees is offered in a wholly conclusory manner, based on her own subjective belief. As a result, Wilson's argument fails. *See Carter v. City of Miami*, 870 F.2d 578, 585 (11th Cir. 1989); *see also Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir.1990) (collecting cases). The district court's entry of summary judgment was appropriate here, too.

IV.

In sum, we are persuaded that the district court did not err in any of its determinations, and, accordingly, affirm its judgments in all respects.

AFFIRMED.

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, AND CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., AND SOUTHERN COMPANY ENERGY SOLUTIONS, Defendants

CIVIL ACTION NO. 1:00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

260 F. Supp. 2d 1317; 2003 U.S. Dist. LEXIS 5890

March 31, 2003, Decided March 31, 2003, Filed

OPINION BY: ORINDA D. EVANS

OPINION:

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 is presently before the court on all Defendants' motion for summary judgment on the individual claims of Plaintiff Charcella Green. For the reasons set forth below, Defendants' motion is GRANTED.

I. Facts

The following facts are undisputed except as indicated otherwise. Plaintiff first began working for Defendant Georgia Power Company ["GPC"] in 1983, first as an intern, then as a regular full-time employee. In 1986, Plaintiff accepted a position with GPC as a Corporate Communications Representative and became a Senior

Corporate Communications Representative in 1987. In 1990, GPC rotated Plaintiff into the position of Assistant to the Director of Corporate Communications. In late 1991, Plaintiff moved into the GPC Educational Services Department and later was assigned to work at GPC'S Shenandoah Center, an environmental education center sponsored by GPC, under the management of Director John Thrasher. Plaintiff Dep. I at 99.

In October of 1996, GPC underwent a massive corporate reorganization and, in conjunction with that reorganization, closed GPC's Shenandoah Center. All four full-time employees who worked at the Shenandoah Center lost their positions. Plaintiff and John Thrasher were transferred to GPC's Community and Economic Development Department,[1] while the other two employees were separated from the company. Specifically, Thrasher lost his management title and accepted a position with GPC as an Education Advisor, a position two pay grade levels below the level he held while working as Director of the Shenandoah Center. Other GPC employees also suffered one- or two-level pay grade reductions through the 1996 reorganization. Conversely, although Plaintiff also transferred to GPC's Community and Economic Development Department as an Education Advisor, she suffered no pay grade reduction.

Plaintiff continues to hold the Education Advisor position today. Plaintiff holds the pay grade level of Exempt Level 5, which Defendants allege is the highest

[1] Apparently, the current Community and Economic Development Department was known as the Area Development Organization at the time of 1996 reorganization.

possible pay grade for her position as Education Advisor. As an Education Advisor, Plaintiff works within the Education Services Department, which is a subdivision within the Community and Economic Development Department. Plaintiff Dep. II at 106-07. The primary functions of the Community and Economic Development Department are to increase revenues, strengthen community relationships, and increase company branding for GPC. *Id.* at 109; Norton Dep. 31-32. The Education Services subdivision develops relationships with educational groups. *Id.* at 116. Plaintiff spends the majority of her time building relationships with state education leaders. *Id.* at 116-21.

Plaintiff applied for an EEO Coordinator position with Defendant Southern Company Services ["SCS"] in 1999.[2]

---

[2] Defendants The Southern Company ["TSC") and Southern Company Energy Solutions, Inc. ("SCES"] move for summary judgment on the grounds that Plaintiff has never been employed by nor did she ever apply for positions at TSC or SCES. Plaintiff has failed to respond to SCES's motion and is deemed to have abandoned her claim against SCES. *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

A plaintiff must be an "employee" to bring a Title VII lawsuit. *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). An "employee" for Title VII purposes is an "individual[ ] who receive[s] compensation from an employer." *Id.* at 1243. An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). The analysis of whether a party is an employer appears to be the same under Title VII and § 1981. *See Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (noting that these statutes have the same requirements of proof and use the same analytical framework); *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 61 n.2 (D.D.C. 1996); *Sargent v. McGrath*, 685 F. Supp. 1087, 1089 (E.D.Wis. 1988); *Alie v. NYNEX Corp.*, 158 F.R.D. 239, 245 n.3 (E.D.N.Y. 1994). Thus, Plaintiff has standing to sue TSC only if it

(Continued on following page)

Plaintiff did not note this promotion application in her complaint and did not refer to it in her discovery responses until January of 2000 because she "forgot about it." Plaintiff Dep. II at 27-28; Plaintiff's Second Am. Interr. Resp. at 3.

Plaintiff believes that GPC began to discriminate against her in terms of her compensation in 1996 when she transferred to the Community and Economic Development Department. James Lovett, John Perryman, Clinton Taylor, Stewart Rodeheaver, and John Thrasher[3] currently work as Community ADO Advisors in the Community Development and Economic Development Department. Myles Smith, James Vaseff, and Steve Foster currently serve as Urban Affairs ADO Advisors. From July of 1998 to July of 2000, Lovett, Perryman, Taylor, Rodeheaver, Thrasher, Smith, Vaseff and Foster reported directly to Lamar Norton.

---

can be shown that TSC constituted an "employer" from whom Plaintiff received compensation.

It is undisputed that TSC is a holding company which owns the stock of all other Defendants named in the complaint but has no employees. Womack Aff. P 9. Plaintiff asserts that Defendants, including TSC, created SCS as a company-wide human resources department and use SCS's "extensive involvement in personnel policy-making and employee selection processes" to maintain "substantial involvement in GPC's personnel decisions." Plaintiff fails to point to any facts in the record to support these allegations. Accordingly, Defendants' motion for summary judgment is GRANTED with respect to TSC and SCES.

[3] Thrasher was transferred to the Community Advisor position in 1997. Thrasher Dec. P 10.

According to Defendants, GPC employees' individual pay increases are determined by the employees' performance and their placement within the pay grade salary range for their position.

This lawsuit was filed on July 27, 2000; Plaintiff joined as a named party when the Second Amended Complaint was filed on August 14, 2000. In the complaint, Plaintiff alleges that Defendants discriminated against her by paying her less than her white co-workers and by improperly denying her promotions.

II. Defendants' Motion for Summary Judgment

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [Defendant] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To prevail in their motion for summary judgment, Defendants must show that the evidence is insufficient to establish an essential element of Plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In ruling on Defendants' motion, the court must view the evidence in a light most favorable to Plaintiff. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). If Defendants make a sufficient showing, then Plaintiff "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting Fed.R.Civ.P. 56(e)).

Under Title VII, an employer may be found liable for unlawful discrimination under any one of three discrete theories: disparate treatment discrimination, pattern and practice discrimination, or disparate impact discrimination. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1273 (11th Cir. 2000).[4] The first two theories require proof of discriminatory intent, while the third does not. *Id.* at 1273. Defendants argue that summary judgment is appropriate here because Plaintiff has failed to establish a claim of intentional discrimination or disparate impact. Plaintiff objects, arguing that there are genuine issues of material fact precluding summary judgment as to both of Plaintiff's intentional discrimination claims.

A. Intentional Discrimination

To establish a prima facie case of race discrimination under a disparate treatment theory, Plaintiff may offer either direct or circumstantial evidence of discriminatory intent. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Alexander v. Fulton County, Ga.*, 207 F.3d 1303 (11th Cir. 2000). If the plaintiff presents direct evidence of discrimination, the defendant is then required to prove by a preponderance of the evidence that it would have taken the adverse employment action even in the absence of discrimination.

[4] Section 1981 provides a cause of action only for claims of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976); *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999).

If the plaintiff provides sufficient circumstantial evidence to support a prima facie case, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802-03. The defendant's burden is "exceedingly light" and is "one of production, not proof." *Id.* at 802. If the defendant satisfies its burden, the presumption of discrimination is eliminated and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. *Id.*

A plaintiff may also use statistical evidence to establish either a prima facie case of discrimination or pretext. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 952 (11th Cir. 1991). Statistics may be used to establish an individual plaintiff's claim that a pattern or practice of discrimination existed, or simply to bolster the plaintiff's circumstantial evidence of individual disparate treatment. Under the pattern and practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). Even if the statistical evidence is insufficient to meet this standard, evidence establishing a discriminatory pattern "is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue." *Parker v. Burnley*, 693 F. Supp. 1138, 1153 (N.D.Ga. 1988) (internal quotation marks and citation omitted). Whether the plaintiff argues that the statistical evidence supports a pattern or practice

claim or simply constitutes evidence of disparate treatment, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown*, 939 F.2d at 952 (citing *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987)).

1. Individual Disiparate Treatment

Promotion Discrimination

The Court determined in the order denying class certification that Plaintiff has standing to pursue only a claim of compensation discrimination under 42 U.S.C. § 1981. *Cooper v. Southern Company*, 205 F.R.D. 596, 606 (N.D.Ga. 2001). This ruling was based on the facts alleged by Plaintiff at the time the certification issue was decided and the statute of limitations applicable to her claims. Defendants argue that they are therefore entitled to summary judgment on Plaintiff's claims with respect to promotion discrimination. Plaintiff argues in response that she has valid promotion claims with respect to one position: Manager of Education Services, for which she applied in 1998. Plaintiff cannot establish a claim based on this position.

Plaintiff's claims are barred to the extent they relate to alleged events occurring more than two years prior to the filing of this suit. *Hill v. Metropolitan Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1546 (11th Cir. 1988) (applying a two year statute of limitations to § 1981 claims). This lawsuit was filed on July 27, 2000; therefore, Plaintiff's

claims must be based on events occurring after July 28, 1998.[5]

Under federal law, the statute of limitations does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights. *Everett v. Cobb County Sch. Dist.*, 138 F.3d 1407, 1410 (11th Cir. 1998); *Calhoun v. Ala. Alcoholic Control Bd.*, 705 F.2d 422, 425 (11th Cir. 1983). Plaintiff argues that her claim with respect to the Manager position is timely because she did not learn that the position had been filled by a "less qualified" white applicant until August 1998. To support this argument, Plaintiff testified in an affidavit as follows:

Thomas did not assume the Manager position until August of 1998.

> I was unaware that a less-qualified Caucasian was awarded the Manager position instead of me until August of 1998 when Thomas assumed the Manager position.

Plaintiff Aff. PP 67-68.

However, this evidence conflicts with Plaintiff's prior deposition testimony indicating that she was aware by

---

[5] Plaintiff argues that she can assert any claim arising within two years preceding July 18, 2000, the date on which Tracey Isom filed an EEOC charge alleging class-wide race discrimination. The Court rejects this argument. Tracey Isom is not a party to this lawsuit and Plaintiff has failed to demonstrate how Isom's EEOC charge is relevant to these proceedings. Further, even if the EEOC charge were relevant, it would only provide Plaintiff with standing to pursue claims arising 180 days before such charge was filed.

early July 1998 that the position had been filled by Pam Thomas.

> Q: Now, when Ms. Page [Thomas's predecessor) went out on maternity leave, . . . she told people she had planned to come back, correct?
>
> A: Uh-huh, that is correct.
>
> Q: So you didn't know there was going to be a vacancy until she came back and worked for a while and said, I'm quitting for good?
>
> A: That is correct.
>
> Q: And that was in approximately August of '98, right?
>
> A: No, that was in June of '98.
>
> Q: June of '98?
>
> A: Uh-huh.
>
> Q: And then when was the position refilled by Ms. Thomas?
>
> A: It was either toward the end of June or the first part of July, I don't remember.

Plaintiff Dep. I at 253-54. Plaintiff also testified that she discussed her failure to obtain the promotion during her performance review held "about two days" after she learned that Thomas had been awarded the position. *Id.* 180-82.

> Q: How did you find out that Ms. Thomas had gotten the job?
>
> A: I got a voice mail.
>
> Q: From who?

A: Lamar Norton.

Q: And what did the voice mail say?

A: That Pam Thomas had been awarded the position as manager of educational services.

Q: Did you speak to anybody after that about the fact that she had been promoted?

A: Yes, I did.

Q: Who did you talk to?

A: I talked to several people.... About two days after Pam Thomas got that job, I had my review with Mary Page and Lamar Norton.

Id. This performance review was held on July 15, 1998. Plaintiff Aff., Ex. BB.

When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony. *Van T. Junkins and Associates, Inc. v. U.S. Industries, Inc.*, 736 F.2d 656, 657 (11th Cir. 1984). Plaintiff does not explain the discrepancy between her deposition and affidavit testimony. Therefore, Plaintiff's deposition testimony will control where Plaintiff's affidavit testimony is expressly contradicted. *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 663 (N.D.Ga. 2001). Plaintiff's deposition testimony clearly establishes that she was aware that Thomas had been awarded the position sometime in early to mid-July 1998. Accordingly, the statute of limitations for any claim based on that employment decision began to run before July 28, 1998, rendering any such claim untimely.

Plaintiff argues in the alternative that the statute of limitations should be equitably tolled because Defendants allegedly misled Plaintiff by claiming the company would investigate whether she was discriminated against but denied Plaintiff any information about such investigation. "Tolling is an extraordinary remedy which should be extended only sparingly." *Justice v. U.S.*, 6 F.3d 1474, 1479 (11th Cir. 1993). According to Plaintiff, after learning that she had been denied the position, she contacted the Defendants' EEO office and requested an investigation into the denial. Plaintiff further claims that she never received any information about an investigation, including whether an investigation was ever conducted. Plaintiff argues that she was thus unable to determine whether the selection process was fair "until Thomas assumed the position in August." Plaintiff's Response at 6.

This argument does not justify the tolling of the statute of limitations. First, Plaintiff's deposition testimony contradicts her assertion that she did not learn until August that Thomas had been awarded the job. Further, Plaintiff's allegations that Defendants did not share any information with her about an investigation do not provide a basis for the "extraordinary" remedy of tolling. Plaintiff provides no evidence other than her affidavit testimony with respect to whether an investigation was ever conducted or even as to whether she actually made such request. Assuming, however, that such request was made, Plaintiff has pointed to no evidence that Defendants withheld any information from her or otherwise discouraged her from filing suit. Based on Plaintiff's own assertions, she knew at least from August 1998 of the facts upon which this claim is based but failed to pursue the claim for almost two years. That Plaintiff did not have all

of the evidence she would need to succeed on her claim when she first became aware of these facts does not justify tolling. *See Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 660 n.19 (11th Cir. 1993).

However, even if the claim was timely, Defendants are also entitled to summary judgment on the merits of the claim. Defendants do not dispute that Plaintiff would be able to establish a prima facie case of promotion discrimination but contend that Plaintiff was not hired because the successful candidate was better qualified for the position than Plaintiff. Norton Dep. 89-90. Plaintiff does not address this asserted non-discriminatory reason for the decision.[6]

However, Plaintiff has provided statistical evidence of racial imbalances in Defendants' promotion and compensation practices as evidence of pretext. Specifically, Plaintiff has offered statistical reports to support her claim that Defendants' practices had a discriminatory effect on black employees. Plaintiff argues that the reports of her expert, Dr. Madden, which find statistically significant disparities in the promotion and compensation of black employees relative to white employees, are evidence from which a reasonable factfinder could determine that intentional discrimination occurred. Defendants contend that Plaintiff's generalized statistics are insufficient to support Plaintiff's claims of intentional discrimination.

As the Supreme Court has noted, while statistical evidence may allow the District Court to "determine . . .

---

[6] Instead, Plaintiff argues that Defendants failed to offer a justification for denying Plaintiff the position. Plaintiff's Response to Defendants' Motion for Summary Judgment at 6, 11.

that the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices. . . . such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." *McDonnell Douglas*, 411 U.S. at 805 n.19 (internal quotation marks and citation omitted). In this case, Plaintiff's statistical evidence is insufficiently tailored to support her individual claims.

Plaintiff's statistics compare the promotion rate of employees within the same pay grade who perform similar job functions; however, these statistics generally fail to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to hiring decisions. Plaintiff does not provide statistics comparing employees with equivalent work experience in specific job categories or job progressions, or outcomes for those employees, both black and white, who had actually applied for posted positions challenged by Plaintiff. Plaintiff relies instead on a statistical analysis of a company-wide data pool and makes no attempt to narrow the data pool to the locations in which she worked or the positions which she challenges. As this Court noted in the order denying class certification, the probative value of Plaintiff's statistical evidence is therefore highly questionable, in significant part due to the treatment of factors such as experience, education, and specific promotion processes. *Cooper v. Southern Company*, 205 F.R.D. 596, 613-14 (N.D.Ga. 2001).

The analytical deficiencies of Plaintiff's statistics diminish the probative value of this evidence such that it cannot by itself support a claim of disparate treatment. *See Brown v. American Honda Corp.*, 939 F.2d 946, 952 (11th Cir. 1991) (holding that summary judgment was appropriate where plaintiff's statistical evidence, which lacked specific analytical foundation and thus failed to show that employer maintained discriminatory intent, was insufficient to establish prima facie case or pretext); *Hawkins v. Ceco Corp.*, 883 F.2d 977, 985 (11th Cir. 1989) (holding that plaintiff's statistical evidence failed to establish prima facie case or pretext where evidence failed to make specific analytical comparisons); cf. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977) (holding that plaintiff's evidence of statistical disparities in hiring, promotion and compensation was sufficient to support claim of intentional discrimination where the employment decisions were based on completely subjective criteria).[7]

Because Plaintiff has failed to establish pretext with respect to Defendants' asserted reason, Defendants are entitled to summary judgment with respect to this claim. *See Chapman v. AI Transport*, 229 F.3d 1012 (11th Cir. 2000); *Combs*, 106 F.3d at 1529.

Other Positions

In the complaint, Plaintiff alleged that she had been discriminated against when she was denied the following

[7] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

positions: Community Advisor, Manager of Education Services in 1996, the managerial position currently held by Christy Terrell, the managerial position currently held by Rick Kimball, and Assistant Vice President of Government and Regulatory Affairs. Third Amended Complaint PP 109-113. With respect to managerial positions held by Terrell and Kimball, Defendants argue that Plaintiff cannot establish a claim because she did not apply for these jobs. With respect to the EEO Coordinator position, Defendants argue that Plaintiff was not awarded the position because she did not possess the appropriate qualifications. With respect to the Assistant Vice President position, Defendants argue that Plaintiff cannot establish a discriminatory promotion claim because she never applied for the position. Plaintiff has failed to respond specifically to Defendants' motion for summary judgment with respect to any promotion claim other than the Manager of Education Services position for which she applied in 1998. Defendants are therefore entitled to summary judgment with respect to these other positions. *See Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to Plaintiff's promotion claim.

Compensation Discrimination

Plaintiff also claims that Defendants discriminated against her by paying her less than similarly situated white employees. Defendants first argue that this claim is barred by the statute of limitations because Plaintiff was aware of the allegedly discriminatory acts outside the statutory period. As noted above, "claims of discrimination

accrue when the plaintiff is informed of the discriminatory act." *Everett,* 138 F.3d at 1410. Defendants contend that Plaintiff should have filed her claim within two years of the 1996 corporate reorganization, based on Plaintiff's testimony that she first began to believe that she was discriminated against with respect to pay at that time. Plaintiff Dep. II at 125-26; 131-32. In response, Plaintiff contends that her claim is not barred because compensation discrimination constitutes a continuing violation bringing her claim within the statute of limitations. The Court of Appeals for the Eleventh Circuit has held that "race based, discriminatory wage payments constitute a continuing violation of Title VII." *Calloway v. Partners Nat. Health Plans*, 986 F.2d 446, 449 (11th Cir. 1993) *see also Bazemore v. Friday*, 478 U.S. 385, 395, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986). Because Plaintiff remains employed by Defendants and apparently contends that the alleged compensation discrimination continues, her claim is timely.

To make out a prima facie case of compensation discrimination, Plaintiff must establish the following four elements: 1) that she is a member of a protected class; 2) that she received low wages; 3) that similarly situated persons outside the protected class received higher wages; and 4) that she was qualified to receive the higher wages. *MacPherson v. University of Montevallo*, 922 F.2d 766, 774 (11th Cir. 1991) (applying the test in an age discrimination case). Defendants do not dispute that Plaintiff is a member of a protected class or that she received low wages but argue that they are entitled to summary judgment on this claim because Plaintiff has failed to establish that she was similarly situated to any of her white co-workers who received higher pay.

"In a comparator analysis, the plaintiff is matched with a person or persons who have very similar job-related characteristics and who are in a similar situation to determine if the plaintiff has been treated differently than others who are similar to him." *Id.* Defendants contend that Plaintiff's only valid comparator is Plaintiff's white co-worker, Elise Hare. Hare, a white female, holds the same position as Plaintiff – Education Advisor – but, according to Defendants, earns approximately $ 10,000 less than Plaintiff. In response, Plaintiff argues that eight of her white co-workers who earn more than she does are proper comparators because their job functions are similar to hers.

Plaintiff's position, Education Advisor, is included in the "ADO Advisor" category within Defendants' employment database. Plaintiff argues that she is similarly situated to eight other employees whose positions fall within the ADO Advisor category. While these employees fall within the ADO Advisor category, their functional job titles are either Community Advisor or Urban Affairs Advisor.[8] Defendants argue that the Community and Urban Advisors are not proper comparators because they do not perform similar duties to Plaintiff.

Plaintiff testified that she is the primary GPC contact for the Georgia School Board Association, the Georgia School Superintendent Association, the Department of Education, the Georgia Association of Educational Leaders, and the Professional Association of Georgia Educators.

---

[8] Plaintiff contends that she is similarly situated to Community Advisors James Lovett, John Perryman, Clinton Taylor, Stewart Rodeheaver, and John Thrasher and Urban Advisors Myles Smith, James vaseff, and Steve Foster.

According to Plaintiff, her duties include working with local communities to discuss issues relating to education, education reform, and economics; facilitating relationships with state and local leaders; strategic planning; leadership training; public policy development; traveling statewide to influence education reform; interacting with local governments and agencies; working with Chambers of Commerce on economic issues; and helping communities devise means to raise revenue for projects. Plaintiff Aff. PP 16-27.

According to Defendants, the Community Advisors are responsible for working with local communities to help them prepare for future economic growth, understand their role in the community, and assess their community infrastructures; meeting with community leaders to discuss the economic development process and identifying funding resources; facilitating relationships between local leaders and other members of the community; strategic planning; leadership training; public policy development; providing specialized training to elected officials and community leaders in systems thinking, board governance, behavior styles, tax digesting, consensus building, and strategic leadership; and traveling statewide to assist business customers and, industry organizations with strategic planning and energy-related needs.

The Urban Advisors are responsible for strategic planning, urban redevelopment, and smart growth planning, primarily for the Atlanta metropolitan area; interacting with local governments and regional agencies; developing regional policies and facilitating meetings between different organizations, communities, and agencies; and strategic planning for rezoning projects, urban revitalization, and design issues.

To show that she performed a similar job as her white co-workers, Plaintiff must show only that "she shared the same type of tasks" as her alleged comparators. *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1529 (11th Cir. 1992) (finding plaintiff established proper comparator where evidence, including description of the type of duties she performed and testimony from defendant's witnesses, established that she shared the same type of tasks as the other buyers). Plaintiff has met this burden. While the testimony of Plaintiff's alleged comparators indicates that their work is primarily focused on different audiences and sometimes requires specialized knowledge, these employees perform the same type of community outreach and planning functions that Plaintiff does. Plaintiff also provided evidence that she and some of her alleged comparators often work together on outreach projects to reach both educational and general community audiences. Plaintiff Aff. PP 20-27. While Defendants offered the testimony of the alleged comparators and their supervisor that Plaintiff does not perform duties similar to theirs, Plaintiff has provided sufficient evidence to support a finding that she and the other ADO Advisors "shared the same type of tasks." *Miranda*, 975 F.2d at 1529 (emphasis added); *see also Moye v. Fleming Co., Inc.*, 924 F. Supp. 1119, 1130 (M.D.Ala. 1996) (holding that plaintiff established proper comparator where the description of plaintiff's tasks and other supervisor's tasks showed that although no other supervisor did exactly the same job as plaintiff, she performed at least some of the same tasks and had a similar degree of responsibility as at least some of alleged comparators).

However, Defendants have provided a legitimate, nondiscriminatory reason for Plaintiff's lower pay. According

to Defendants, Plaintiff is paid less than her comparators because a market survey, conducted by Defendants, indicated that the value of an Education Advisor was less than that of a Community or Urban Affairs Advisor in the applicable region. Specifically, Defendants contend that pay grade ranges for positions at GPC are established by market surveys and studies of similar positions at other companies in the region. Blalock Dep. at 9-10; Norton Dep. at 196. In 1996, GPC conducted a market survey which resulted in coding the Education Advisor position as exempt level three to exempt level five pay grade range and coding the Community and Urban Affairs Advisor positions as exempt level five to exempt level seven because the value of these positions was deemed to be higher than the Education Advisor position. Blalock Dep. at 92, 143-44.

Plaintiff attempts to establish pretext by arguing that the market survey is not the real reason for Plaintiff's lower pay. Specifically, Plaintiff argues that Defendants' market survey results do not justify Plaintiff's lower pay because black Community and Urban Affairs Advisors earn less than their white counterparts and because the market survey did not actually determine that the Education Advisor was valued lower than the other ADO Advisor positions. Plaintiff, however, has failed to come forward with sufficient evidence to support her claims.

The proper pretext analysis is whether Plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employers proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997). To support her claim that the Community

and Urban Affairs Advisor positions are not actually more highly valued than the Education Advisor position, Plaintiff submits the 2000 Performance Pay Plan for Deryl Belser. App, to Pla. Resp. to Def. Mot. S. J., Ex. 26. The document indicates that Belser held the position of ADO Advisor II and received *a* base salary increase in 2000 from $45,544 to $48,290. Although Plaintiff contends in her response that Belser is black and that he is an Urban Affairs Advisor, she has presented no evidence to support these assertions. Plaintiff also contends that Nettie Felder, a black ADO Advisor was paid less than Felder's white co-workers, but Plaintiff fails to point to any evidence that supports this claim. Thus, these claims do not create an issue as to whether Community and Urban Affairs Advisors are actually valued more highly than the Education Advisors.

Plaintiff also argues that the market survey conducted by Defendants in 1996 does not indicate that Education Advisors are less valuable than the other ADO Advisors. To survive summary judgment, Plaintiff must come forward with evidence of specific facts to contradict Defendants' reason. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting Fed.R.Civ.P. 56(e)). To support her argument with respect to the market survey, Plaintiff contends that Defendants have provided no evidence to support their claim that a market study was performed with respect to the ADO Advisor positions. Plaintiff has provided a copy of a market survey of GPC positions conducted in 1996 which does not appear to include information about the positions at issue. However, as noted above, Defendants did provide testimony that such a market study was conducted and that the results

valued the Community and Urban Affairs Advisor positions more highly. Blalock Dep. at 92, 143-44. That Defendants did not include the ADO Advisor positions in the market survey report is not substantially probative; Plaintiff provides no evidence with respect to whether that survey included all positions within the company or whether formal market surveys were even required. Based on this evidence, the inference that Defendants did not actually survey the market with respect to the ADO Advisor positions is no more likely than the inference that they did conduct such a survey. Thus, Plaintiff has failed to create a genuine issue of fact precluding summary judgment. Cf. *James v. Otis Elevator Co.*, 854 F.2d 429, 432 n.3 (11th Cir. 1989).

However, Plaintiff also argues that she was discriminated against because she received unfairly low merit increases and incentives. Specifically, Plaintiff contends that she unfairly received lower merit increases than John Thrasher received. According to Plaintiff, her lower increases were unfair because although the merit increases are based on an employee's performance, Thrasher, despite receiving poor performance evaluations, received higher increases than Plaintiff. Plaintiff, however, has failed to point to evidence to support her assertion that Thrasher received higher merit increases than she did.

Plaintiff points to Thrasher's performance pay plans for 1999 and 2000 but only refers to her performance pay plans for 1997, 1998 and 2000. Thus, the only evidence to support Plaintiff's claim that Thrasher received higher increases than she did are the 2000 plans, which indicate that Plaintiff received a 2.58% merit increase and 16% incentive award while Thrasher received a 2.26% merit increase and 11.6% incentive award. While Plaintiff

purports to offer evidence that she earned a lower percentage merit increase in 1999 than Thrasher did, the document that she submitted in this respect is inadmissible. That these percentage awards resulted in higher actual awards for Thrasher due to his higher base salary is not evidence of discrimination because Defendants have already offered a non-discriminatory explanation for that difference in compensation. Plaintiff has therefore failed to produce evidence sufficient to support a finding of pretext. Accordingly, Defendants' motion for summary judgment with respect to Plaintiff's compensation claims is GRANTED.

2. Pattern and Practice

Plaintiff has failed to create a genuine issue of material fact as to whether a pattern or practice of discrimination existed. As discussed above, Plaintiff has provided statistical evidence in an attempt to establish pretext. While "statistics as to [Defendants'] employment policy and practice may be helpful to a determination of whether [Defendants'] refusal to [ ]hire [Plaintiff] in this case conformed to a general pattern of discrimination against blacks," *McDonnell Douglas*, 411 U.S. at 805, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); In re: *Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1312 (11th Cir. 1999) The analytical deficiencies of Plaintiff's statistical evidence, discussed above, render this evidence insufficient to support a pattern or practice claim.

In addition to Plaintiff's expert reports, Plaintiff offers Defendants' internal personnel documents to support her argument that Defendants maintained a pattern or practice of compensation discrimination. While these documents indicate some disparity in compensation between black and white employees, these documents are not probative as to whether Defendants intentionally discriminated against Plaintiff during the period in question. The documents indicate average salaries of employees divided by racial classification but do not control for factors such as education, experience or skill level and thus cannot prove that Defendants discriminated on the basis of race. Plaintiff has thus failed to come forward with evidence sufficient to prove that intentional discrimination was Defendants' "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75 Accordingly, Defendants' motion for summary judgment with respect to Plaintiff's pattern and practice claim is GRANTED.

B. Disparate Impact

Finally, Defendants argue that plaintiff has failed to establish a claim of disparate impact under Title VII. To establish a claim under a theory of disparate impact, Plaintiff must show 1) the existence of a statistically significant disparity among members of different groups affected by employment decisions; 2) the existence of a specific, facially neutral employment practice; and 3) the existence of a causal nexus between the specific, facially neutral employment practice and the statistically significant disparity. 42 U.S.C. § 2000e-2(k); *Joe's Stone Crab*, 220 F.3d at 1274; In re: *Alabama*, 198 F.3d at 1311-14. Defendants contend that Plaintiff's statistics, which are

not adjusted to account for differences among various positions and the respective skill and education levels required, are insufficient to establish a statistically significant disparity required to state a claim and that even if Plaintiff could establish such disparity, she has failed to show a causal link to a neutral employment practice.

As evidence of a facially neutral policy, Plaintiff points to Defendants' promotion and compensation policies, which Plaintiff contends permits subjective, discretionary, and unmonitored decisions. While Plaintiff has failed to identify in her response to Defendants' motion for summary judgment a specific policy which has had an impermissibly discriminatory impact on her, Plaintiff provided evidence in her motion for class certification to support her claim that Defendants allowed the use of subjective criteria by decisionmakers in each of their subsidiaries.

However, simply showing that Plaintiff was subject to subjective policies does not establish a prima facie case of disparate impact. Plaintiff must also show the existence of a causal nexus between these specific, facially neutral employment practices and a statistically significant disparity. "'Plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'" *Joe's Stone Crab*, 220 F.3d at 1275 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988)). In this case, Plaintiff has failed to establish that manager discretion in compensation and promotion decisions caused a statistically significant disparity.

To establish the first element of a disparate impact claim, Plaintiff relies on her expert's report which finds statistically significant disparities in the compensation of black employees relative to white employees. As Defendants note, however, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); In re: *Alabama*, 198 F.3d at 1312. While plaintiff's expert reports an over-all statistical disparity between black and white employees in compensation, Plaintiff's evidence generally fails to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to compensation.

Even if these statistics were sufficient to establish a statistically significant disparity, Plaintiff cannot establish the existence of a causal nexus between the disparity and a specific, facially neutral employment practice. As noted above, Plaintiff has failed to indicate a specific facially neutral practice other than the use of manager discretion in compensation decisions. Further, Plaintiff has presented only company-wide statistics and does not tailor the data to control for factors such as skill level and experience. For Plaintiff to establish that the use of a practice as broad and amorphous as manager discretion causes a statistically significant disparity would require Plaintiff to eliminate the effect of variation in these factors, which she has failed to do in the statistics currently before the Court. Therefore, Defendants' motion for summary judgment with respect to Plaintiff's disparate

impact claim is GRANTED. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir. 1993) (holding that employer is entitled to summary judgment where plaintiff fails to provide evidence necessary to prove at trial that there is disproportionate impact of employer's policy on black employees).

For the reasons stated above, Defendants' motion for summary judgment is GRANTED.

SO ORDERED, this 31st day of March, 2003.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, AND CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., AND SOUTHERN COMPANY ENERGY SOLUTIONS, INC. Defendants

CIVIL ACTION NO. 1:00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

260 F. Supp. 2d 1278; 2003 U.S. Dist. LEXIS 5766

March 31, 2003, Filed

OPINION:

ORDER

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq., and 42 U.S.C. § 1981 is presently before the court on all Defendants' motion for summary judgment on the individual claims of Plaintiff Sarah Jean Harris. For the reasons set forth below, Defendants' motion is GRANTED.

I. Facts

The following facts are undisputed unless noted otherwise. Plaintiff began working at Georgia Power Company ["GPC"] in 1979 as a General Clerk.[1] By 1989,

[1] Defendants The Southern Company ["TSC"], Southern Company Energy Solutions, Inc. ["SCES"], and Southern Company Services

(Continued on following page)

she had progressed to Operating Assistant. In 1994, plaintiff was reassigned to the Duluth office as a Secretary. Plaintiff's job title was changed to Region Support Representative in 1997.

["SCS"] move for summary judgment on the grounds that Plaintiff has never been employed by nor did she ever apply for positions at TSC, SCES, or SCS. Plaintiff has failed to respond to SCES's motion and is deemed to have abandoned his claim against SCES. *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern RY. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

A plaintiff must be an "employee" to bring a Title VII lawsuit. *Llampallas v. Mini-Circuits. Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). An "employee" for Title VII purposes is an "individual[ ] who receives compensation from an employer." *Id.* at 1243. An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). The analysis of whether a party is an employer appears to be the same under Title VII and § 1981. *See Standard v. A.B.E.L. Services. Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (noting that these statutes have the same requirements of proof and use the same analytical framework); *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 61 n.2 (D.D.C. 1996); *Sargent v. McGrath*, 685 F. Supp. 1087, 1089 (E.D.Wis. 1988); *Alie v. NYNEX Corp.*, 158 F.R.D. 239, 245 n.3 (E.D.N.Y. 1994). Thus, Plaintiff has standing to sue TSC only if it can be shown that TSC constituted an "employer" from whom Plaintiff received compensation.

It is undisputed that TSC is a holding company which owns the stock of all other Defendants named in the complaint but has no employees. Womack Aff. P 9. Plaintiff asserts that Defendants, including TSC, created SCS as a company-wide human resources department and use SCS's "extensive involvement in personnel policy-making and employee selection processes" to maintain "substantial involvement in GPC's personnel decisions." Plaintiff fails to point to any facts in the record to support these allegations; however, even if this were true, it is irrelevant with respect to Plaintiff's claims. Plaintiff has failed to provide evidence that any SCS employees were involved in any allegedly discriminatory acts. *See Wood v. Southern Bell Telephone and Telegraph Co.*, 725 F. Supp. 1244, 1249-50 (N.D.Ga. 1989). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to TSC, SCES and SCS.

Performance Evaluations

Hugh Walters, Power Delivery Manager for the GPC's Gwinnett Region, evaluated Plaintiff's job performance for 1997 and noted that she needed "to improve in the following areas: teamwork, cooperation, personal use of telephones, and getting to work on time." Walters Dec. P 5. Furthermore, Plaintiff did not "show adequate objectivity or openness to the views of others" and made "minimal" contributions to building team spirit. *Id.* Plaintiff sometimes "exhibited a lack of tact or consideration for others and she would be easier to work with if she projected a more positive outlook and pleasant manner." *Id.*

In his evaluation of her job performance for 1998, Thomas B. Davis, Plaintiff's supervisor, noted that she continued to make excessive use of the telephone for personal calls and was habitually tardy and remained unwilling or unable to cooperate with her co-workers. Davis Dec. P 9. In April, May and June of 1999, Davis and Walters coached Plaintiff regarding her unsatisfactory performance. In her mid-year 1999 evaluation, Plaintiff was rated either "Unsatisfactory" or "Needs Improvement" in every performance category listed on the evaluation sheet. Davis Dec. P 6. Among other things, the evaluation noted that Plaintiff worked overtime to complete tasks that should have been completed in half a day, made mistakes matching service orders with wiring approvals, remained unsuccessful working in group situations, remained unable to return from lunch on time, and continued to spend too much time on personal telephone calls.

Shortly after her 1999 mid-year review, Walters placed Plaintiff on GPC's Positive Discipline program. The Positive Discipline Program is used when an employee

does not respond to informal mechanisms to correct poor work performance. In level one, the Oral Reminder, the employee's immediate supervisor reminds the employee of the supervisor's performance expectations and describes how the employee is not meeting those expectations. If the Oral Reminder does not correct the problem, a Written Reminder is administered. The Written Reminder is the second level of Positive Discipline and documents a discussion about unacceptable behavior or performance, the supervisor's expectations, and what the employee intends to do to correct the problem. If, within twelve months from the date of the Written Reminder, the employee does not correct the problems, the final level of Positive Discipline, Decision-Making Leave ["DML"], is triggered. The DML includes a discussion during which the extreme seriousness of the employee's problem is made clear, and the requirement for a total performance commitment is communicated. The employee is given a workday off with pay to decide either to resolve the problem or resign from GPC. If the employee elects the former option, specific notice is given that if any performance problem that requires disciplinary action occurs in the eighteen months following the DML, the employee is likely to be terminated. An employee who fails to make adequate improvement while on DHL, or who commits another work infraction which might otherwise call for discipline during the eighteen months while a DML is active, is discharged.

On October 7, 1999, Plaintiff was placed on DML status and she was given a day off to consider whether she wanted to remain employed by GPC. Upon return from DML, Plaintiff made a total performance commitment to her assigned duties and agreed to work toward solving her work performance and conduct problems. Plaintiff was the

only Customer Service Employee in the entire Gwinnett Region who was on DML status.

Defendants allege that although Plaintiff showed some improvement in her February 2000 evaluation, which covered her performance in the second half of 1999, "the problems still existed that were documented and talked about in the reviews." Davis Dec. P 8; Davis Dep. at 57. Defendants also contend that Plaintiff's performance remained below that of other employees in her department. Davis Dec. P 8. Plaintiff challenges this description of her performance, pointing to Davis's testimony that he did not have any problems with Plaintiff's performance beginning one month after she was placed on DML status. Davis Dep. 52-53. Plaintiff also challenges Defendants' assertion that her performance remained below that of other employees, pointing to evidence that a white employee performing the same or similar tasks was rated at the same level as Plaintiff. Plaintiff Aff., Ex. J.

Defendants also contend that Plaintiff's evaluations from January 1998 through July of 2000 were not as good as those of Plaintiff's white co-workers. Plaintiff challenges this assertion, arguing that the scores in her mid-year 2000 evaluation were equal to those of her white co-workers, and that her evaluation score for 1999 was the same as one of her white co-workers. Plaintiff Aff., Ex. J.

Promotions

In 1999, Plaintiff approached Charles Mitchell about filling an open Region Support Representative position. According to Plaintiff, Mitchell told her that the position was being held for Denise Hewes, a white employee. Plaintiff alleges that she then told Mitchell that she

"wouldn't interview for it." Plaintiff Dep. 126. Defendants contend that Mitchell informed Plaintiff that the opening was for an entry-level position which would have been a demotion for Plaintiff. Mitchell Dec. P 3. Neither Plaintiff nor Hewes applied for the position, which was awarded to a third person. *Id.*

In January of 1999, Kay Barron was awarded a Drafter's position as a result of a developmental move. Developmental moves are, in accordance with GPC policy, exempted from the Company's standard posting process. According to Defendants, Hugh Walters, Alan Golden, and Charles Mitchell identified Barron for a developmental move into this position because of her excellent performance the preceding three years as a Region Support Representative. Barron had Previously expressed interest in becoming a Drafter and had in fact passed the drafting exam on April 28, 1998. Plaintiff had never expressed any interest in becoming a Drafter and never attempted the drafting exam.

On June 23, 1999, a second Drafter position was posted in the Duluth Operating Center. The position would require the successful candidate to provide scaled and detailed engineering related drawings to support company construction, maintenance and operations activities, and to provide plans and sketches, resolve design problems, prepare estimates, and make scale calculations. Plaintiff did not apply for the position. The position was awarded to John Tillman, an employee who was already a Drafter A with six years' experience in the engineering department. Plaintiff had no engineering experience, had not taken the required Technical Occupations Draft test, and therefore, lacked essential experience required for the position.

Compensation

According to Defendants, GPC's annual merit pay increases and bonuses are performance-based. In 1998 and 1999, David Seago made the final decisions on what performance-based compensation increases would be given to Plaintiff and her white co-workers Diane Wylie and Lynn Collett. Defendants assert that the race of each woman played no role whatsoever in any decision he made regarding performance-based compensation increases. According to Defendants, Seago made these decisions based on each woman's job performance, as memorialized in the performance evaluations prepared by Thomas B. Davis, their direct supervisor. Defendants contend that throughout 1998, 1999 and 2000, neither Wylie nor Collett was on any form of corrective discipline. Plaintiff argues that Wylie and Collett's evaluations state that they took long lunches, were late to work, and made personal phone calls. Harris Aff., Ex. L.

Due to a company reorganization in the Fall of 2000, the Distribution Employees – Plaintiff, Collett, and Wylie – began reporting to Jim Sykes. Thus, Jim Sykes and David Seago jointly made the final decisions on what performance-based compensation increases would be given Diane Wylie and Lynn Collett in 2000. Plaintiff did not receive a performance-based increase in 2000 because she was terminated prior to her year-end review.

Retaliation

On July 27, 2000, Plaintiff and her co-plaintiffs filed the instant lawsuit. Plaintiff alleged that she "received lower performance evaluation scores than her Caucasian counterparts who perform in an equal or less proficient

manner." Third Amended Complaint at 35. Plaintiff also alleged that she was "denied job opportunities on the basis of her race." *Id.* at 36.

Shortly after filing her lawsuit, Plaintiff requested a mid-year performance evaluation. Defendants provided Plaintiff with an evaluation expressing general satisfaction with Plaintiff's performance. Defendants contend that shortly after completing this evaluation, they began receiving complaints about Plaintiff's job performance, including customer complaints about delays in service connections, co-worker complaints that service orders prepared by Plaintiff for engineers were filled with mistakes, and complaints that Plaintiff's personal telephone usage had dramatically increased and was preventing her from completing her work. Defendants further claim that the work Plaintiff did complete was riddled with significant errors, leading to numerous customer complaints.

Defendants further claim that around August 22, 2000, Walters was informed that Plaintiff had falsified a document to make it appear that on August 16, 2000, she had given a GPC engineer information about an address that needed to be visited to determine what service was necessary. Walters Dep. 58-60. Specifically, Defendants contend that an engineer, Keith Thomas, went to his supervisor, Steve Lewis, and reported that he had received a work order on August 22, 2000, which Thomas believed had originally been received by Plaintiff on August 16, 2000. *Id.* at 87, 90-91. Walters concluded that Plaintiff in fact gave the engineer the document on August 22, 2000, and falsified company records to make it appear that the engineer had failed to visit the address in a timely manner. *Id.* at 91.

According to Defendants, on August 24, 2000, Walters and Davis met with Seago to discuss the drastic decline in Plaintiff's performance. Defendants contend that after considering her DML status, her falsification of records, and the dramatic decline in her performance since her mid-year review, Seago and Walters decided to terminate Plaintiff.

Plaintiff's Claims

In Plaintiff's Amended Responses to GPC's First Interrogatories, she identified twenty-nine individuals who she contends received higher compensation for work that is the same or similar to work she performed.[2] In 1998, 1999, and 2000, David Seago did not make the final decisions on what performance-based compensation increases would be given to any of these employees except for Sheila Green. During this time period, none of these employees worked in the Gwinnett Region under his supervision or under the supervision of either Hugh Walters or Britt Davis. In 1998, 1999, and 2000, all of these employees except for Sheila Green worked in different regions and under different supervisors than Plaintiff. Defendants allege that some of these employees had different job titles and vastly different job duties from Plaintiff. None had ever been placed on DML status. In

[2] They are Priscilla Johnson, Teresa Thompson, Bantes Hodges, Diane Seagraves, Rebecca Sellers, Belinda Seamen, Carolyn Helms, Patricia Ann Reuter, Christine Morris, Regina Sinclar, Ann Rogers, Diane Cooper, Deborah Lee, Phyllis Austin, Rebeca Stevens, Tara Prince, Carolyn Simmons, Cathy McDaniel, Sallyann Mount, Jewel Lewis, Shirley Stefanini, Susan Hinnant, Barbara Mansell, Neita Cox, Suzanne Corley, Sabra Zautke, Nancy Crisp, Carlita Stewart, and Sheila Green.

September of 2000, Plaintiff amended her complaint to allege that she was terminated in retaliation for filing the instant suit and because of her race.

II. Defendants' Summary Judgment Motion

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [Defendant] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To prevail in their motion for summary judgment, Defendants must show that the evidence is insufficient to establish an essential element of Plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In ruling on Defendants' motion, the court must view the evidence in a light most favorable to Plaintiff. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). If Defendants make a sufficient showing, then Plaintiff "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting Fed.R.Civ.P. 56(e)).

Under Title VII, an employer may be found Liable for unlawful discrimination under any one of three discrete theories: disparate treatment, pattern and practice, or disparate impact. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1273 (11th Cir. 2000).[3] The first two theories require

[3] Section 1981 provides a cause of action only for claims of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 239, 48

(Continued on following page)

proof of discriminatory intent, while the third does not. *Id.* at 1273. Defendants argue that summary judgment is appropriate here because Plaintiff has failed to establish a claim of intentional discrimination or disparate impact. Plaintiff objects, arguing that there are genuine issues of material fact precluding summary judgment as to both Plaintiff's intentional discrimination and disparate impact claims. Because the theories place different burdens on Plaintiff, the Court will address them separately.

A. Intentional Discrimination

To establish a prima facie case of race discrimination under a disparate treatment theory, Plaintiff may offer either direct or circumstantial evidence of discriminatory intent. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Alexander v. Fulton County, Ga.*, 207 F.3d 1303 (11th Cir. 2000). If the plaintiff presents direct evidence of discrimination, the defendant is then required to prove by a preponderance of the evidence that it would have taken the adverse employment action even in the absence of discrimination.

To make a prima facie case using circumstantial evidence, a plaintiff may use the test recognized in McDonnell Douglas.[4] Under this test, a plaintiff may establish a prima facie case by demonstrating 1) that he

---

L. Ed. 2d 597, 96 S. Ct. 2040 (1976); *Ferrill v. Parker Group. Inc.*, 168 F.3d 468, 472 (11th Cir. 1999)

[4] The McDonnell Douglas standard for a prima facie case is applicable in employment discrimination suits brought under 42 U.S.C. § 1981. *Sledge v. Goodyear Dunlop Tires North America, Ltd.*, 275 F.3d 1014 (11th Cir. 2001).

belongs to a protected class under Title VII; 2) that he was qualified for and applied for the job; 3) that he was rejected; and 4) that others who were not members of the protected class were promoted. *Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997). If the plaintiff provides sufficient circumstantial evidence to support a prima facie case, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802-03. The defendant's burden is "exceedingly light" and is "one of production, not proof." *Id.* at 802. If the defendant satisfies its burden, the presumption of discrimination is eliminated and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. *Id.*

A plaintiff may also use statistical evidence to establish a prima facie case of discrimination or pretext. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 952 (11th Cir. 1991). Statistics may be used to establish an individual plaintiff's claim that a pattern or practice of discrimination existed, or simply to bolster the plaintiff's other circumstantial evidence of individual disparate treatment. Under the pattern and practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). Even if the statistical evidence is insufficient to meet this standard, evidence establishing a discriminatory pattern "is probative of motive and can therefore create an

inference of discriminatory intent with respect to the individual employment decision at issue." *Parker v. Burnley*, 693 F. Supp. 1138, 1153 (N.D.Ga. 1988) (internal quotation marks and citation omitted). Whether the plaintiff argues that the statistical evidence supports a pattern or practice claim or simply constitutes evidence of disparate treatment, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown*, 939 F.2d at 952 (*citing Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987)).

In their motion, Defendants assert that Plaintiff has failed to establish a discrimination claim under any of the available theories. In response, Plaintiff points to facts in the record which she contends raise genuine issues of material fact precluding summary judgment as to her claims of retaliation, compensation discrimination, pattern and practice discrimination, and disparate impact. It is therefore necessary to determine whether Plaintiff has provided sufficient evidence to raise a genuine issue of material fact to preclude summary judgment as to these claims.

Failure to Promote

Plaintiff alleges in the complaint that Defendants improperly denied her promotions based on her race. complaint P 99. Specifically, Plaintiff claims that Defendants discriminated against her when they did not hire her to fill the Senior Region Support Representative position in October of 1999. Defendants argue that summary judgment is appropriate because Plaintiff never

applied for this position or for any other position during her employment by Defendants.

Generally, a plaintiff's failure to apply for the position in question precludes a claim of discrimination in promotion. *Evans v. McClain of Georaia. Inc.*, 131 F.3d 957, 963 (11th Cir. 1997); *Harris v. Warehouse Services. Inc.*, 77 F. Supp. 2d 1240, 1246 (M.D.Ala. 1999). However, a plaintiff is not required to show that she applied for a position if she shows that the employer maintained an informal promotion process under which job opportunities were not regularly posted. *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126 (11th Cir. 1984); *Harris v. Birmingham Board of Education*, 712 F.2d 1377 (11th Cir. 1983). Plaintiff does not dispute that she did not apply for this or any other position during her employment and has not pointed to any evidence that Defendants maintained an informal promotion process under which job opportunities were not regularly posted. Because Plaintiff has failed to establish a prima facie case, her claim for promotion discrimination must fail. *Chapman v. AI Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000). Accordingly, Defendants motion for summary judgment on Plaintiff's failure to promote claim is GRANTED.

Compensation Discrimination

To make out a prima facie case of compensation discrimination, Plaintiff must establish the following four elements: 1) that she is a member of a protected class; 2) that she received low wages; 3) that similarly situated persons outside the protected class received higher wages; and 4) that she was qualified to receive the higher wages. *MacPherson v. University of Montevallo*, 922 F.2d 766, 774

(11th Cir. 1991) (applying the test in an age discrimination case). Defendants argue that summary judgment is appropriate because Plaintiff cannot establish that similarly situated persons outside the protected class were paid more than she was or that she was qualified to receive the higher wages.

Defendants first contend that summary judgment is appropriate because Plaintiff has failed to produce evidence of a proper comparator and thus cannot establish that similarly situated persons outside the protected class received higher wages. "In a comparator analysis, the plaintiff is matched with a person or persons who have very similar job-related characteristics and who are in a similar situation to determine if the plaintiff has been treated differently than others who are similar to him." *Id.* Plaintiff claims that co-workers Wylie, Collett, and Barron were similarly situated white employees who were paid more than she was.

Plaintiff has failed to point to any evidence to support her claim that Kay Barron is a proper comparator.[5] Plaintiff cites to the deposition testimony of her former supervisor, Britt Davis, to support her argument that she, Collett, and Wylie performed the same or similar functions. According to Davis's testimony, Plaintiff, Collett, and Wylie carried out administrative tasks for the cable locator team under Davis's supervision. Davis indicated that Collett was responsible for recording data with respect to the

[5] Plaintiff cites to the performance evaluations for herself and Barron as evidence that they performed similar tasks. Although these reports indicate that Plaintiff and Barron held similar job titles, they contain no information as to what their respective specific job functions were.

team's completed work orders and for resolving problems with respect to service delivery and that she also served as a back-up for recording the crew's work time. Davis Dep. 25-26. Wylie's main function was to enter crew time and invoice data and to complete several other minor administrative duties. Plaintiff's responsibility was to process service requests from new customers. There is some evidence that Plaintiff, Wylie, and Collett were capable of performing each other's job functions to some degree but did not do so on a regular basis.

Defendants argue that Plaintiff has no proper comparator pointing out that none of the alleged comparators had the same discipline problems as Plaintiff. Specifically, Defendants argue that Plaintiff's performance problems prevented her from receiving better evaluations and the higher performance-based compensation received by her co-workers. Plaintiff was the only Customer Service Employee in the entire Gwinnett Region who was on DHL status. According to Defendants, throughout 1998, 1999, and 2000, neither Wylie nor Collett was on any form of corrective discipline.

Plaintiff argues that her performance deficiencies cannot justify her lower compensation for two reasons. First, Plaintiff asserts that merit increases and annual incentives were the only aspects of compensation affected by employee performance. Plaintiff contends that her co-workers' merit increases were at most only two percent more than Plaintiff's merit increases and that therefore performance deficiencies do not explain why Wylie earned fourteen percent and Collett nineteen percent more than Plaintiff. Plaintiff cites to supervisor Seago's testimony that merit increases and annual incentives were based on employee performance; however, Seago did not address

whether employee performance affected other aspects of compensation. Plaintiff has not pointed to any other evidence to support her claim that only merit increases and annual incentives were performance-based. Thus, Plaintiff has failed to establish that these merit increases were the only aspect of compensation affected by employee performance.

Plaintiff also contends that her poor performance does not justify the compensation disparity because her co-workers were also counseled about performance deficiencies. Specifically, Plaintiff relies on her co-workers' performance evaluations indicating that her co-workers were advised to "keep personal phone calls to a minimum and limit lunch breaks to 60 minutes." Plaintiff Aff., Ex. L. However, as Defendants note, these evaluations were completed in 1998, and there is no evidence that either Wylie or Collett failed to correct these issues after being counseled about them. Plaintiff also contends that she did not commit "significantly" more errors than white employees performing the same or similar jobs and challenges Defendants' contention that Plaintiff's evaluations from January 1998 through July of 2000 were not as good as those of Plaintiff's white co-workers. To support these claims, Plaintiff notes that the scores in her mid-year 2000 evaluation were equal to those of her white coworkers, and that her evaluation score for 1999 was the same as one of her white co-workers. Plaintiff Aff., Ex. J. That Plaintiff twice received evaluation scores equal to her white co-workers after being counseled about her performance deficiencies and placed on DML status is insufficient to overcome Defendants' evidence that Plaintiff's overall performance during the period in question was not as good as that of her white co-workers. Plaintiff's belief that her

performance was equal to that of her co-workers does not support a finding that Plaintiff was actually qualified for the higher pay. *Holifield v. Reno*, 115 F.3d 1555, 1565 (11th Cir. 1997).

Such disparity in disciplinary status precludes the use of Collett and Wylie as proper comparators. *See MacPherson*, 922 F.2d at 774-75 (comparing performance evaluation scores to determine whether co-workers are in "similar situation" and thus proper comparators). Plaintiff's inability to controvert Defendants' evidence with respect to her poor performance also weakens her argument that she was qualified for the higher wage. In any event, even if Plaintiff was able to establish a prima facie case, Plaintiff's poor performance also constitutes Defendants' nondiscriminatory reason for her lower compensation. As discussed above, Plaintiff has failed to provide sufficient evidence to rebut Defendants' evidence with respect to Plaintiff's poor performance nor has Plaintiff provided evidence to establish that Plaintiff's poor performance was not the real reason for her compensation rate.

Plaintiff has also provided statistical evidence of racial imbalances in Defendants' compensation practices as evidence of pretext. Specifically, Plaintiff has offered statistical reports to support her claim that Defendants' compensation practices had a discriminatory effect on black employees. Plaintiff argues that the reports of her expert, Dr. Madden, which find statistically significant disparities in the compensation of black employees relative to white employees, are evidence from which a reasonable fact-finder could determine that intentional discrimination occurred. Defendants contend that Plaintiff's generalized statistics are insufficient to support Plaintiff's claims of intentional discrimination.

As the Supreme Court has noted, while statistical evidence may allow the District Court to "determine . . . that the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices . . . such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." *McDonnell Douglas*, 411 U.S. at 805 n.19 (internal quotation marks and citation omitted). In this case, Plaintiff's statistical evidence is insufficiently specific to support her individual claims.

Plaintiff's statistics compare the compensation rate of employees within the same pay grade who perform similar job functions; however, these statistics generally fail to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to compensation decisions. Plaintiff does not provide statistics comparing employees with equivalent work experience in specific job categories or job progressions. Plaintiff relies instead on a statistical analysis of a company-wide data pool and makes no attempt to narrow the data pool to the locations or specific position in which she worked. As this Court noted in the order denying class certification, the probative value of Plaintiff's statistical evidence is therefore highly questionable, in significant part due to the treatment of factors such as experience, education and specific promotion processes. *Cooper v. Southern Company*, 205 F.R.D. 596, 613-14 (N.D.Ga. 2001).

The analytical deficiencies of Plaintiff's statistics diminish the probative value of this evidence such that it cannot by itself support a claim of disparate treatment, *See Brown v. American Honda Corp.*, 939 F.2d 946, 952 (11th Cir. 1991) (holding that summary judgment was appropriate where plaintiff's statistical evidence, which lacked specific analytical foundation and thus failed to show that employer maintained discriminatory intent, was insufficient to establish prima facie case or pretext); *Hawkins v. Ceco Corp.*, 883 F.2d 977, 985 (11th Cir. 1989) (holding that plaintiff's statistical evidence failed to establish prima facie case or pretext where evidence failed to make specific analytical comparisons); cf. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977)[6] (holding that plaintiff's evidence of statistical disparities in hiring, promotion and compensation was sufficient to support claim of intentional discrimination where the employment decisions were based on completely subjective criteria).

Because Plaintiff has failed to provide any evidence of pretext, Defendants are entitled to summary judgment on Plaintiff's compensation claim. Accordingly, Defendants' motion for summary judgment is GRANTED with respect to Plaintiff's compensation claim.

Retaliation

Plaintiff also contends that her termination in August 2000 following the filing of this lawsuit constituted retaliation prohibited under Title VII. To prevail on her retaliation

---

[6] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

claim, Plaintiff must show (1) statutorily protected expression, (2) adverse employment action, and (3) a causal link between the protected expression and the adverse action. *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993). Defendants contend that summary judgment is appropriate because Plaintiff has failed to establish a causal link between the lawsuit and her termination.

The causal link requirement is interpreted broadly: "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." *Meeks v. Computer Associates Intern.*, 15 F.3d 1013, 1021 (11th Cir. 1994) (internal quotation marks and citation omitted). To establish a causal link, Plaintiff relies on the short time between the filing of the lawsuit on July 27, 2000, and her termination on September 1, 2000. Such temporal proximity is sufficient to establish a prima facie case. *See Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1337 (11th Cir. 1999) (holding that plaintiff established prima facie case of retaliation where evidence indicated that plaintiff was terminated seven weeks after supervisors became aware that plaintiff filed EEOC charge).

Once Plaintiff has established prima facie case, Defendants may rebut a presumption of discrimination by offering a nondiscriminatory reason for Plaintiff's termination. *Goldsmith*, 996 F.2d at 1163. In this case, Defendants contend that Plaintiff was terminated in August 2000 due to a rapid and severe deterioration in her performance in July and August of that year and to Plaintiff's alleged falsification of company documents. Plaintiff argues that the allegations of a decline in performance are contradicted by statements contained in the positive evaluation she received just one week before Defendants

made the decision to terminate her employment. Plaintiff also offers evidence to contradict Defendants' allegations that she falsified documents. Plaintiff argues that this evidence creates genuine issues of fact with respect to the cause of her termination precluding summary judgment.

Defendants contend that the evaluation at issue covered only Plaintiff's performance from January 2000 through June 2000 and thus does not rebut the evidence that Plaintiff's performance declined beginning in July 2000. However, Plaintiff provides evidence that the evaluation applied to Plaintiff's post-June performance as well. The evaluation does refer to events in July. However, this "event" was the publication of a company newsletter noting that Defendants had received a customer letter thanking Plaintiff and others for their service and there is no evidence with respect to when the letter was written.[7] Plaintiff also offers the testimony of Seago and Davis that supervisors may discuss performance issues with employees outside the context of a formal evaluation. This evidence is insufficient to create an issue of fact as to whether the evaluation covered Plaintiff's performance after June 2000.

Plaintiff's evidence with respect to whether she falsified a document is only relevant to the extent that it proves Defendants did not reasonably believe that Plaintiff falsified the document. *See E.E.O.C. v. Total System Services. Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000) (citing *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (noting that inquiry is not whether employee

[7] Defendants contend that the letter was written in May 2000 but offer to evidence to support this assertion.

was guilty of misconduct but whether employer in good faith believed employee had done wrong and whether this belief was the reason for the termination)). Defendants contend that Plaintiff's supervisor, Hugh Walters, had information which led him to conclude that on August 22, 2000, Plaintiff gave a service order to Keith Thomas, an engineer, but then made an entry into the computer system indicating that she had given it to him on August 16, 2000. According to Defendants, on August 22, 2000, Thomas reported to his supervisor, Steve Lewis, that Plaintiff had given him a work order, printed from the software program which organizes service requests, that day. Walters Dep. 91. Lewis then "went out in the field" to determine what type of service was required. *Id.* After returning to the office that day, Lewis checked the order within the software program and noted that it appeared to have been amended to indicate that the work order had been given to Thomas on August 16, 2000. *Id.* Upon receiving this information, Walters discussed the matter with Lewis before determining that Plaintiff had falsified the document. *Id.* at 90. Walters did not confront Plaintiff with this evidence. *Id.* at 88. However, Defendants contend that Walters was not required to question Plaintiff about the document. Seago Dep. 39-40. While Plaintiff has provided evidence to contradict Defendants' description with respect to whether Davis, Plaintiff's immediate supervisor, participated in the termination decision, there is no evidence to support a finding that Walters did not maintain a good faith belief that Plaintiff falsified the document. Given Plaintiff's disciplinary status at the time, this evidence is insufficient to create a genuine issue of material fact as to pretext. Accordingly, Defendants' motion for summary judgment with respect to Plaintiff's retaliation claim is GRANTED.

Pattern and Practice

Plaintiff has failed to create a genuine issue of material fact as to whether a pattern or practice of discrimination existed. As discussed above, Plaintiff has provided statistical evidence in an attempt to establish a claim of pattern and practice discrimination. While "statistics as to [Defendants'] employment policy and practice may be helpful to a determination of whether [Defendants'] refusal to [ ]hire [Plaintiff] in this case conformed to a general pattern of discrimination against blacks," *McDonnell Douglas*, 411 U.S. at 805, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re: Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1312 (11th Cir. 1999). The analytical deficiencies of Plaintiff's statistical evidence, discussed above, render this evidence insufficient to support a pattern or practice claim.

In addition to Plaintiff's expert reports, Plaintiff offers Defendants' internal personnel documents to support his argument that Defendants maintained a pattern or practice of compensation discrimination. While these documents indicate some disparity in compensation between black and white employees, these documents are not probative as to whether Defendants intentionally discriminated against Plaintiff during the period in question. The documents indicate average salaries of employees divided by racial classification but do not control for factors such as education, experience or skill level and thus cannot prove that Defendants discriminated on the basis of race. Plaintiff has thus failed to come

forward with evidence sufficient to prove that intentional discrimination was Defendants' "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75 Accordingly, Defendants' motion for summary judgment with respect to Plaintiff's pattern or practice claim is GRANTED.

B. Disparate Impact

Finally, Defendants argue that Plaintiff has failed to establish a claim of disparate impact under Title VII. To establish a claim under a theory of disparate impact, Plaintiff must show 1) the existence of a statistically significant disparity among members of different groups affected by employment decisions; 2) the existence of a specific, facially neutral employment practice; and 3) the existence of a causal nexus between the specific, facially neutral employment practice and the statistically significant disparity. 42 U.S.C. § 2000e-2(k), *Joe's Stone Crab*, 220 F.3d at 1274; *In re: Alabama*, 198 F.3d at 1311-14. Defendants contend that Plaintiff's statistics, which are not adjusted to account for differences among various positions and the respective skill and education levels required, are insufficient to establish a statistically significant disparity required to state a claim and that even if Plaintiff could establish such disparity, she has failed to show a causal link to a neutral employment practice.

As evidence of a facially neutral policy, Plaintiff points to Defendants' compensation policies, especially Defendants' base salary policy, which Plaintiff contends permits subjective, discretionary and unmonitored decisions. While Plaintiff has failed to identify in her response to Defendants' motion for summary judgment a specific policy

which has had an impermissibly discriminatory impact on her, Plaintiff provided evidence in her motion for class certification to support her claim that Defendants allowed the use of subjective criteria by decisionmakers in each of its subsidiaries.

However, simply showing that Plaintiff was subject to subjective policies does not establish a prima facie case of disparate impact. Plaintiff must also show the existence of a causal nexus between these specific, facially neutral employment practices and a statistically significant disparity. "'Plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'" *Joe's Stone Crab*, 220 F.3d at 1275 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988)). In this case, Plaintiff has failed to establish that manager discretion in compensation decisions caused a statistically disparity within the promotions for which she applied.

To establish the first element of a disparate impact claim, Plaintiff relies on her expert's report which finds statistically significant disparities in the compensation of black employees relative to white employees. As Defendants note, however, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re: Alabama*, 198 F.3d at 1312. While Plaintiff's expert reports an over-all statistical disparity between black and white employees in compensation, Plaintiff's evidence generally fails to compare similarly situated individuals, significantly

diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to compensation.

Even if these statistics were sufficient to establish a statistically significant disparity, Plaintiff cannot establish the existence of a causal nexus between the disparity and a specific, facially neutral employment practice. As noted above, Plaintiff has failed to indicate a specific facially neutral practice other than the use of manager discretion in compensation decisions. Further, Plaintiff has presented only company-wide statistics and does not tailor the data to control for factors such as skill level and experience. For Plaintiff to establish that the use of a practice as broad and amorphous as manager discretion causes a statistically significant disparity would require Plaintiff to eliminate the effect of variation in these factors, which she has failed to do in the statistics currently before the Court. Therefore, Defendants' motion for summary judgment with respect to Plaintiff's disparate impact claim is GRANTED. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir. 1993) (holding that employer is entitled to summary judgment where plaintiff fails to provide evidence necessary to prove at trial that there is disproportionate impact of employer's policy on black employees).

For the reasons stated above, Defendants' motion for summary judgment is GRANTED.

SO ORDERED, this 31st day of March, 2003.

/s/ ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, AND CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., AND SOUTHERN COMPANY ENERGY SOLUTIONS, INC., Defendants

CIVIL ACTION NO. 1:00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

260 F. Supp. 2d 1305; 2003 U.S. Dist. LEXIS 5725

March 31, 2003, Decided
March 31, 2003, Filed

OPINION BY: ORINDA D. EVANS

OPINION:

ORDER

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 is presently before the court on all Defendants' motion for summary judgment on the individual claims of Plaintiff Irene McCullers. For the reasons set forth below, Defendants' motion is GRANTED.

I. Facts

The following facts are undisputed unless indicated otherwise. Defendant Georgia Power Company ["GPC"] hired Plaintiff Irene McCullers ["Plaintiff"] in 1978 as a file clerk. Plaintiff is an African-American woman. The

last position Plaintiff held while employed by GPC was Document Processing Operator Senior. This position was one pay grade lower than Chief Document Processing Operator. At GPC, Gail Ward ("Ward"], who worked in the same department as Plaintiff, held the position of Chief Document Processing Operator. Ward is a white female.

In January of 1997, Plaintiff and some of her GPC co-workers, including Ward, transferred from employment with GPC to Southern Company *Services,* Inc. ["SCS").

---

[1] Defendants The Southern Company ("TSC") and Southern Company Energy Solutions, Inc. ["SCES"] move for summary judgment on the grounds that Plaintiff has never been employed by nor did she ever apply for positions at TSC or SCES. Plaintiff has failed to respond to SCES's motion and is deemed to have abandoned her claim against SCES. *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk & Southern Ry.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

A plaintiff must be an "employee" to bring a Title VII lawsuit. *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). An "employee" for Title VII purposes is an "individual[ ] who receive[s] compensation from an employer." *Id.* at 1243. An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). The analysis of whether a party is an employer appears to be the same under Title VII and § 1981. *See Standard v. A.B.E.L. Servs.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (noting that these statutes have the same requirements of proof and use the same analytical framework); *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 61 n.2 (D.D.C. 1996); *Sargent v. McGrath*, 685 F. Supp. 1087, 1089 (E.D.Wis. 1988); *Alie v. NYNEX Corp.*, 158 F.R.D. 239, 245 n.3 (E.D.N.Y. 1994). Thus, Plaintiff has standing to sue TSC only if it can be shown that TSC constituted an "employer" from whom Plaintiff received compensation.

It is undisputed that TSC is a holding company which owns the stock of all other Defendants named in the complaint but has no employees. Womack Aff. P 9. Plaintiff asserts that Defendants, including TSC, created SCS as a company-wide human resources department and use SCS's "extensive involvement in personnel policy-making and employee selection processes" to maintain "substantial

(Continued on following page)

When Plaintiff moved from GPC to employment with SCS, she was given the job title of Computer Operator I. This change in Plaintiff's job title did not entail any change in Plaintiff's compensation level or seniority in comparison to her peers. Upon moving from GPC to SCS, Ward was given the title of Computer Operator Senior. Computer Operator Senior was one pay grade level higher than Computer Operator I. When Plaintiff moved from GPC to SCS, she was assigned to the Imaging and Micrographic group ["IMS"), which is a part of SCS's Production Systems Department. The Production Systems Department is part of SCS's Infrastructure Organization, which is part of SCS's larger Information Resources Department.

In 1997 when Plaintiff moved to SCS, white employees Mildred Brune ["Brune"], Shirley Keen ("Keen"], and Faye Starbird ("Starbird") were already employed by SCS in the IMS, and they had job titles within the Accounting Clerk job family. Keen, Starbird, and Brune were hired by SCS more than six years before GPC hired Plaintiff. In early 1999, SCS decided to reduce and consolidate the number of job titles and job families in the Information Resources Department. As part of the consolidation effort, SCS merged the Computer Operator and the Accounting Clerk job families into one new job family titled Processing Operator. Plaintiff's job title was changed from Computer

---

involvement in GPC's personnel decisions." Plaintiff fails to point to any facts in the record to support these allegations; however, even if this were true, it is irrelevant with respect to McCullers' claims.

Plaintiff has failed to point to facts sufficient to support her argument that TSC is liable for any discriminatory acts. *See Wood v. Southern Bell Telephone and Telegraph Co.*, 725 F. Supp. 1244, 1249-50 (N.D.Ga. 1989). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to TSC and SCES.

Operator I to Processing Operator I. This change in Plaintiff's job title did not entail any change in Plaintiff's compensation level, seniority, or job responsibilities.

Brune and Keen, who held SCS Accounting Clerk Coordinator titles, assumed Processing Operator I titles. Starbird's position, SCS Accounting Clerk Senior, was renamed Processing Operator II. In May 1999, SCS promoted Starbird to Processing Operator I. On March 4, 2000, SCS promoted Brune to Processing Operator Senior. According to Defendants, SCS promoted Brune to Processing Operator Senior because she performed her duties at a level that SCS viewed as consistently meeting and exceeding expectations. Defendants contend that SCS did not promote Plaintiff from Processing Operator I to Processing Operator Senior because, unlike Brune, plaintiff's performance was not viewed as consistently meeting and exceeding job expectations, and because Plaintiff had ongoing deficiencies in work attendance and tardiness.

Plaintiff filed this suit on July 27, 2000, claiming that Defendants discriminated against her by denying her a progressive promotion to Processing Operator Senior and by paying her less than similarly situated white co-workers.

II. Defendants' Motion for Summary Judgment

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [Defendant] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To prevail in its motion for summary judgment, Defendants must show that the evidence

is insufficient to establish an essential element of Plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In ruling on Defendants' motion, the court must view the evidence in a light most favorable to Plaintiff. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). If Defendants make a sufficient showing, then Plaintiff "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (*quoting* Fed.R.Civ.P. 56(e)).

Under Title VII, an employer may be found liable for unlawful discrimination under any one of three discrete theories: disparate treatment discrimination, pattern and practice discrimination, or disparate impact discrimination. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1273 (11th Cir. 2000).[2] The first two theories require proof of discriminatory intent, while the third does not. *Id.* at 1273. Defendants argue that summary judgment is appropriate here because Plaintiff has failed to establish a claim of intentional discrimination or disparate impact. Plaintiff objects, arguing that there are genuine issues of material fact precluding summary judgment as to both Plaintiff's intentional discrimination and disparate impact claims. Because the theories place different burdens on the parties, the Court will address them separately.

---

[2] Section 1981 provides a cause of action only for claims of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976); *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999).

A. Intentional Discrimination

To establish a prima facie case of race discrimination under a disparate treatment theory, Plaintiff may offer either direct or circumstantial evidence of discriminatory intent. *See McDonnell Douglas Corp, v. Green*, 411 U.S. 792, 802-03, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Alexander v. Fulton County, Ga.*, 207 F.3d 1303 (11th Cir. 2000). If the plaintiff presents direct evidence of discrimination, the defendant is then required to prove by a preponderance of the evidence that it would have taken the adverse employment action even in the absence of discrimination.

To make a prima facie case using circumstantial evidence, a plaintiff may use the test established in *McDonnell Douglas*.[3] A plaintiff may establish a prima facie case by demonstrating 1) that he belongs to a protected class under Title VII; 2) that he was qualified for and applied for the job; 3) that he was rejected; and 4) that others who were not members of the protected class were promoted. *Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997).

If the plaintiff provides sufficient circumstantial evidence to support a prima facie case, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged employment

[3] The *McDonnell Douglas* standard for a prima facie case is applicable in employment discrimination suits brought under 42 U.S.C. § 1981. *Sledge v. Goodyear Dunlop Tires North America, Ltd.*, 275 F.3d 1014 (11th Cir. 2001).

action. *McDonnell Douglas*, 411 U.S. at 802-03. The defendant's burden is "exceedingly light" and is "one of production, not proof." *McDonnell Douglas*, 411 U.S. at 802. If the defendant satisfies its burden, the presumption of discrimination is eliminated and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. *Id.*

A plaintiff may also use statistical evidence to establish either a prima facie case of discrimination or pretext. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 952 (11th Cir. 1991). Statistics may be used to establish an individual plaintiff's claim that a pattern or practice of discrimination existed, or simply to bolster the plaintiff's circumstantial evidence of individual disparate treatment. Under the pattern and practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 P.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). Even if the statistical evidence is insufficient to meet this standard, evidence establishing a discriminatory pattern "is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue." *Parker v. Burnley*, 693 F. Supp. 1138, 1153 (N.D.Ga. 1988) (internal quotation marks and citation omitted). Whether the plaintiff argues that the statistical evidence supports a pattern or practice claim or simply constitutes evidence of disparate treatment, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown v. American Honda Motor Co.*, 939 F.2d 946,

952 (11th Cir. 1991) (*citing Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987)).

1. Disparate Treatment

Promotion Discrimination

Defendants first argue that they are entitled to summary judgment on Plaintiff's promotion claim because Plaintiff has failed to establish a prima facie case of promotion discrimination. To establish a prima facie case for alleged failure to receive a promotion, Plaintiff must demonstrate that 1) she was a member of a protected class; 2) she applied and was generally qualified for the up-grade; 3) she did not receive the promotion; and 4) a similarly situated white employee received promotion over Plaintiff. *See. e.g., Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001); *Harris v. Sec'y, U.S. Dep't of the Army*, 119 F.3d 1313, 1321 (8th Cir. 1997) (applying test in context of non-competitive promotion). In the complaint, Plaintiff alleges that she was discriminated against when co-worker Brune became a Processing Operator Senior while Plaintiff remained a Processing Operator One. This was a "progressive promotion" for Brune based on job performance.[4]

Defendants are entitled to summary judgment on this claim because Plaintiff has failed to establish a prima facie

[4] Plaintiff also contends in the complaint that she was discriminated against when, at the time of her transfer from GPC to SCS, co-worker Ward was promoted to Processing Operator Senior but Plaintiff was not. Because Ward's promotion occurred in 1997, any claim based on the transfer is barred by the applicable statutes of limitations for Title VII and Section 1981 claims.

case of promotion discrimination. Defendants state and Plaintiff does not contend that progressive promotions are not awarded to one employee to the detriment of another. Gantt Dec. P 5. Therefore, Plaintiff cannot show that a similarly situated white employee received a promotion over her because she and Brune were not competing for the same position. Nor can Plaintiff establish that she was qualified for a promotion. To qualify for progressive promotion from Processing Operator I to Processing Operator Senior, SCS requires only that the employee perform at an overall level that "consistently meets and exceeds expectations." *Id.* According to Defendants, Plaintiff was not a consistently strong performer – she did not consistently perform at a level that met and exceeded the expectations of her job. Gantt Dec. PP 6-8; Patten Dec. PP 6, 18. Plaintiff argues that she was in fact qualified for a promotion because she received better evaluations than her alleged comparators and because her alleged performance deficiencies were not actually considered serious performance problems by Defendants. According to Plaintiff, she had the requisite experience and knowledge for the job and was rated in meets and exceeds expectations range, just as Brune was. Patten Dec. P 6; Gantt Dec. P 7. Plaintiff also argues that her alleged tardiness and absenteeism could not have been considered a serious problem because she was rated at the consistently meets and frequently exceeds level and her 1999 and 2000 evaluations do not specifically mention any such problems. However, Plaintiff has produced no evidence to support her contention that she was rated at the consistently meets and frequently exceeds level. Further, a supervisor's testimony that he would note areas of weakness in an employee's performance in the employee's formal evaluation does not establish that Defendants did not consider Plaintiff's tardiness and

absenteeism in making promotion decisions. Gantt Dep. 25.

Plaintiff also points to evidence that she received higher percentage merit increases in 1998 and 1999 than Brune did. Patten Dec. PP 14, 20. However, Plaintiff provides no evidence with respect to how the exact percentage of increase is determined. Further, as Defendants note, Brune received a higher percentage merit increase that Plaintiff in 2000, the year in which Brune was promoted. Thus Plaintiff's evidence with respect to the percentage of merit increases is insufficient to create an issue of fact as to whether Plaintiff was qualified for a promotion.

Because Plaintiff has failed to state a prima facie case of promotion discrimination and cannot otherwise establish that intentional discrimination occurred, Plaintiff's promotion claim must fail. Accordingly, Defendants' motion for summary judgement is GRANTED with respect to Plaintiff's promotion claims.

Compensation Discrimination

Plaintiff contends that Defendants discriminated against her by paying her less than similarly situated white co-workers. To make out a prima facie case of compensation discrimination, Plaintiff must establish the following four elements: 1) that she is a member of a protected class; 2) that she received low wages; 3) that similarly situated persons outside the protected class received higher wages; and 4) that she was qualified to receive the higher wages. *MacPherson v. University of Montevallo*, 922 F.2d 766, 774 (11th Cir. 1991) (applying the test in an age discrimination case. Defendants do not

dispute that Plaintiff is a member of a protected class or that she received low wages but argue that they are entitled to summary judgment on this claim because Plaintiff has failed to establish that she was similarly situated to any of her white co-workers who received higher pay.

"In a comparator analysis, the plaintiff is matched with a person or persons who have very similar job-related characteristics and who are in a similar situation to determine if the plaintiff has been treated differently than others who are similar to him." *Id.* Plaintiff claims that co-workers Ward, Brune, Starbird, and Keen are similarly situated white employees who are paid more than she is. Starbird and Keen constitute proper comparators because they hold the same position as Plaintiff and thus perform the same functions as Plaintiff. Brune is also a proper comparator to the extent that she held the same title as Plaintiff during the period in question.

Defendants however contend that Plaintiff received lower compensation than Brune, Starbird, and Keen because these coworkers have been employed by Defendants for at least six years more than Plaintiff. Seniority constitutes a legitimate nondiscriminatory explanation for a difference in pay. *Mulhall v. Advance Security, Inc.*, 19 F.3d 586, 599 (11th Cir. 1994). Plaintiff attempts to establish pretext by arguing that seniority cannot explain the pay differential because Plaintiff received a higher percentage merit increase than Brune and Keen in 1998 and 1999. Plaintiff also argues that seniority does not explain why Starbird earns a higher salary than Plaintiff because Starbird earned less than Plaintiff in 1999. However, that Brune and Keen received a lower percentage increase does not contradict Defendants' evidence that Brune and Keen

received a higher base salary because they had worked for Defendants longer than Plaintiff had. That Starbird earned less than Plaintiff in 1999 but now earns more than Plaintiff is attributable to Starbird's seniority to Plaintiff and promotion in 1999 to the same position as Plaintiff. Plaintiff also argues that Defendants did not specifically refer in their discovery responses to seniority as a reason for the pay disparity and do not rely on seniority to explain pay disparities with respect to another Plaintiff is evidence of pretext. However, these minor variances are insufficient to support a finding of pretext.

Nor has Plaintiff provided sufficient evidence to establish that Ward was improperly paid more than she was. Plaintiff has arguably made out a prima facie case by showing that she and Gail Ward, a white employee, perform the same or similar work and Ward is more highly compensated.

> Q Is it fair to say that Ms. Ward's position is the same as or similar to Ms. McCullers'?
>
> A Yes.

Gantt Dep. at 70-71. There is also evidence that there was little variation in the daily responsibilities between the two jobs. *Id.* at 16-17.

In response, Defendants point out that Plaintiff has never held the same title as Ward. At all relevant times Ward, a Processing Operator Senior, has been classified as one notch above Plaintiff, a Processing Operator I. And while Plaintiff's supervisor did state that he considered her position "the same or similar to" Ward's position, he also testified that in her higher position, Ward faced higher expectations than Plaintiff. *Id.* at 16-17. Defendants point

out that Plaintiff has never met Defendants' job assessment criterion, of "meets and exceeds expectations" although she has always been found to "meet expectations". Under Defendants policy, this is not enough for a progressive promotion. Also, Defendant states that Plaintiff has had problems with tardiness and absenteeism. *See* Gantt Dep. 42-43, 45-47, 54; Gantt Decl. P 6, 18. Plaintiff does not deny this. Plaintiff Dep. 76-77, 179-80, 263-67.

In response to Defendants' statement of its reasons for not having paid Plaintiff at the Processing Operator Senior level (Ward's classification), Plaintiff basically argues that Defendants' assessment of her performance level is incorrect. This is not enough to establish pretext.

However, Plaintiff provided statistical evidence of racial imbalances in Defendants' hiring and compensation practices as evidence of pretext. Specifically, Plaintiff has offered statistical reports to support her claim that Defendants' hiring and compensation practices had a discriminatory effect on black employees. Plaintiff argues that the reports of her expert, Dr. Madden, which find statistically significant disparities in the hiring and compensation of black employees relative to white employees, are evidence from which a reasonable fact-finder could determine that intentional discrimination occurred. Defendants contend that Plaintiff's generalized statistics are insufficient to support Plaintiff's claims of intentional discrimination.

As the Supreme Court has noted, while statistical evidence may allow the District Court to "determine . . . that the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices. . . . such general determinations, while helpful, may not be in and of themselves controlling as to an individualized

hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." *McDonnell Douglas*, 411 U.S. at 805 n.19 (internal quotation marks and citation omitted). In this case, Plaintiff's statistical evidence is insufficiently tailored to support her individual claims.

Plaintiff's statistics compare the promotion rate of employees within the same pay grade who perform similar job functions; however, these statistics generally fail to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to promotion and compensation decisions. Plaintiff does not provide statistics comparing employees with equivalent work experience in specific job categories or job progressions. Plaintiff relies instead on a statistical analysis of a company-wide data pool and makes no attempt to narrow the data pool to the locations in which she worked or the positions which she challenges. As this Court noted in the order denying class certification, the probative value of Plaintiff's statistical evidence is therefore highly questionable, in significant part due to the treatment of factors such as experience, education, and specific promotion processes. *Cooper v. Southern Company* 205 F.R.D. 596, 613-14 (N.D.Ga. 2001).

The analytical deficiencies of Plaintiff's statistics diminish the probative value of this evidence such that it cannot by itself support a claim of disparate treatment. *See Brown v. American Honda Corp.*, 939 F.2d 946, 952 (11th Cir. 1991) (holding that summary judgment was appropriate where plaintiff's statistical evidence, which lacked specific analytical foundation and thus failed to

show that employer maintained discriminatory intent, was insufficient to establish prima facie case or pretext); 883 F.2d 977, 985 (11th Cir. 1989) (holding that plaintiff's statistical evidence failed to establish prima facie case or pretext where evidence failed to make specific analytical comparisons); cf. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977)[5] (holding that plaintiff's evidence of statistical disparities in hiring, promotion and compensation was sufficient to support claim of intentional discrimination where the employment decisions were based on completely subjective criteria). Accordingly, Defendants' motion for summary judgment on Plaintiff's claim of compensation discrimination is GRANTED.

2. Pattern and Practice

Plaintiff has failed to create a genuine issue of material fact as to whether a pattern or practice of discrimination existed. As discussed above, Plaintiff has provided statistical evidence in an attempt to establish a claim of pattern and practice discrimination. While "statistics as to [Defendants'] employment policy and practice may be helpful to a determination of whether [Defendants'] refusal to [ ]hire [Plaintiff] in this case conformed to a general pattern of discrimination against blacks," *McDonnell Douglas*, 411 U.S. at 805, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re: Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d

[5] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

1305, 1312 (11th Cir. 1999). The analytical deficiencies of Plaintiff's statistical evidence, discussed above, render this evidence insufficient to support a pattern or practice claim.

In addition to Plaintiff's expert reports, Plaintiff offers Defendants' internal personnel documents to support her argument that Defendants maintained a pattern or practice of compensation discrimination. While these documents indicate some disparity in compensation between black and white employees, these documents are not probative as to whether Defendants intentionally discriminated against Plaintiff during the period in question. The documents indicate average salaries of employees divided by racial classification but do not control for factors such as education, experience or skill level and thus cannot prove that Defendants discriminated on the basis of race. Plaintiff has thus failed to come forward with evidence sufficient to prove that intentional discrimination was Defendants' "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75 Accordingly, Defendants' motion for summary judgment with respect to Plaintiff's pattern and practice claim is GRANTED.

B. Disparate Impact

Finally, Defendants argue that Plaintiff has failed to establish a claim of disparate impact under Title VII. To establish a claim under a theory of disparate impact, Plaintiff must show 1) the existence of a statistically significant disparity among members of different groups affected by employment decisions; 2) the existence of a specific, facially neutral employment practice; and 3) the

existence of a causal nexus between the specific, facially neutral employment practice and the statistically significant disparity. 42 U.S.C. § 2000e-2(k); *Joe's Stone Crab*, 220 F.3d at 1274; *In re: Alabama*, 198 F.3d at 1311-14. Defendants contend that Plaintiff's statistics, which are not adjusted to account for differences among various positions and the respective skill and education levels required, are insufficient to establish a statistically significant disparity required to state a claim and that even if Plaintiff could establish such disparity, she has failed to show a causal link to a neutral employment practice.

As evidence of a facially neutral policy, Plaintiff points to Defendants' promotion and compensation policies, which Plaintiff contends permits subjective, discretionary, and unmonitored decisions. While Plaintiff has failed to identify in her response to Defendants' motion for summary judgment a specific policy which has had an impermissibly discriminatory impact on her, Plaintiff provided evidence in her motion for class certification to support her claim that Defendants allowed the use of subjective criteria by decisionmakers in each of its subsidiaries.

However, simply showing that Plaintiff was subject to subjective policies does not establish a prima facie case of disparate impact. Plaintiff must also show the existence of a causal nexus between these specific, facially neutral employment practices and a statistically significant disparity. "'Plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'" *Joe's Stone Crab*, 220 F.3d at 1275 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988)). In this case,

Plaintiff has failed to establish that manager discretion in compensation and promotion decisions caused a statistically significant disparity.

To establish the first element of a disparate impact claim, Plaintiff relies on her expert's report which finds statistically significant disparities in the compensation of black employees relative to white employees. As Defendants note, however, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re: Alabama*, 198 F.3d at 1312. While Plaintiff's expert reports an over-all statistical disparity between black and white employees in compensation, Plaintiff's evidence generally fails to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to compensation.

Even if these statistics were sufficient to establish a statistically significant disparity, Plaintiff cannot establish the existence of a causal nexus between the disparity and a specific, facially neutral employment practice. As noted above, Plaintiff has failed to indicate a specific facially neutral practice other than the use of manager discretion in compensation decisions. Further, Plaintiff has presented only company-wide statistics and does not tailor the data to control for factors such as skill level and experience. For Plaintiff to establish that the use of a practice as broad and amorphous as manager discretion causes a statistically significant disparity would require Plaintiff to eliminate the effect of variation in these

factors, which she has failed to do in the statistics currently before the Court. Therefore, Defendants' motion for summary judgment with respect to Plaintiff's disparate impact claim is GRANTED. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir. 1993) (holding that employer is entitled to summary judgment where plaintiff fails to provide evidence necessary to prove at trial that there is disproportionate impact of employer's policy on black employees).

For the reasons stated above, Defendants' motion for summary judgment is GRANTED.

SO ORDERED, this 31 day of March, 2003.

ORINDA D. EVANS

UNITED STATES DISTRICT JUDGE

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, AND CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., ND SOUTHERN COMPANY ENERGY SOLUTIONS, INC., Defendants

CIVIL ACTION NO. 1:00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

260 F. Supp. 2d 1258; 2003 U.S. Dist. LEXIS 5724

March 31, 2003, Decided
March 31, 2003, Filed

OPINION BY: ORINDA D. EVANS

OPINION:

ORDER

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 is presently before the court on all Defendants' motion for summary judgment on the individual claims of Plaintiff Michael Edwards. For the reasons set forth below, Defendants' motion is GRANTED.

I. Facts

The following facts are undisputed except as indicated otherwise. Plaintiff was hired by Defendant Georgia Power

Company ("GPC") in 1987.[1] Complaint P 86. He held positions in several different organizations within GPC, and was employed as a Lineman in early 1999 when he

---

[1] Defendants The Southern Company ["TSC"], Southern Company Energy Solutions, Inc. ["SCES"], and Southern Company Services ["SCS"] move for summary judgment on the grounds that Plaintiff has never been employed by nor did he ever apply for positions at TSC, SCES, or SCS. Plaintiff has failed to respond to SCES's motion and is deemed to have abandoned his claim against SCES. *Resolution Trust Core. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

A plaintiff must be an "employee" to bring a Title VII lawsuit. *Llampallas v. Mini-Circuits. Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). An "employee" for Title VII purposes is an "individual[] who receive[s] compensation from an employer." *Id.* at 1243. An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). The analysis of whether a party is an employer appears to be the same under Title VII and § 1981. *See Standard v. A.B.E.L. Services. Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (noting that these statutes have the same requirements of proof and use the same analytical framework); *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 61 n.2 (D.D.C. 1996); *Sargent v. McGrath*, 685 F. Supp. 1087, 1089 (E.D.Wis. 1988); *Alie v. NYNEX Corp.*, 158 F.R.D. 239, 245 n.3 (E.D.N.Y. 1994). Thus, Plaintiff has standing to sue TSC only if it can be shown that TSC constituted an "employer" from whom Plaintiff received compensation.

It is undisputed that TSC is a holding company which owns the stock of all other Defendants named in the complaint but has no employees. Womack Aff. P 9. Plaintiff asserts that Defendants, including TSC, created SCS as a company-wide human resources department and use SCS's "extensive involvement in personnel policy-making and employee selection processes" to maintain "substantial involvement in GPC's personnel decisions." Plaintiff fails to point to any facts in the record to support these allegations; however, even if this were true, it is irrelevant with respect to Plaintiff's claims. Plaintiff has failed to provide evidence that any SCS employees were involved in any allegedly discriminatory acts. *See Wood v. Southern Bell Telephone and Telegrah Co.*, 725 F. Supp. 1244, 1249-50 (N.D.Ga. 1989). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to TSC, SCES and SCS.

reported problems with a work-related back injury. Edwards Dep., Vol. III, at 47-51 & Exhibit 4. Effective on or about March 3, 1999, he was placed on permanent work restrictions by his physician. *Id.* These restrictions limited his lifting and bending functions, which ultimately precluded him from continuing in the Lineman position. *Id.* Thereafter, Plaintiff alternated between extended absences and light duty work assignments until November, 1999. *Id.* at 47-51, 61.

During the period from March through November, 1999, and thereafter, a representative from the Workers' Compensation Department at GPC made efforts to find alternate positions for Plaintiff and identified a number of opportunities for him. *Id.* at 63-64; White Dec. PP 5-13. One such opportunity was a temporary Cable Locator position, which Plaintiff accepted and occupied beginning on or about November 22, 1999. Edwards Dep., Vol. III, at 61-62. In that assignment, Plaintiff reported to James Weldon, Cable Locating Manager at GPC. Edwards Dep., Vol. I, at 28. Weldon apparently did not advertise the opening but accepted Plaintiff into the position based on White's recommendation. Weldon Dep. 54.

The duties of a Cable Locator generally include locating underground electrical cable at various locations within an assigned region to facilitate engineering, construction, and other types of projects and to avoid potential accidents or outages associated with such projects. Weldon Dec. P 2; Edwards Dep., Vol. II, at 332-33; Edwards Dep., Vol. III, at 158-60 & Exhibit 2. These duties require mapping skills, planning skills, teamwork, and the ability to work without direct supervision. Weldon Dec. P 2; Edwards Dep., Vol. II, at 332-33; Edwards Dep., Vol. III, at 56-59 & Exhibit 2.

Plaintiff's temporary Cable Locator assignment ended on or about April 29, 2000. Edwards Dep., Vol. I, at 18; Edwards Dep., Vol. III, at 61-62. He has been receiving a combination of workers' compensation benefits and long term disability insurance benefits totaling approximately $2,170.00 per month since the end of his assignment in April, 2000. Edwards Dep., Vol. III, at 170-71.

Plaintiff applied for a regular (non-temporary) Cable Locator position in late March or early April, 2000. Complaint P 88; Weldon Dec. PP 5-6. The record reveals the following concerning the selection process. The hiring manager for this position was James Weldon, who at the time was Plaintiff's supervisor in the temporary Cable Locator assignment. Weldon Dep. at 53; Weldon Dec. P 5. Weldon testified that 35-40% of the individuals he has hired to fill the Cable Locator position are black. Weldon Dep. 18. Weldon prepared a listing of Cable Locator job duties. He, in conjunction with GPC's human resources department, prepared a job announcement which was posted on GPC's JobNet system. Numerous employees applied. Of those who applied, Weldon chose seven individuals for interviews. Plaintiff Edwards was one of those selected. Weldon had become Edwards' manager on November 22, 1999. However, Weldon did not have day-to-day contact with Plaintiff, as the Cable Locator job is by its nature a field position; also, Plaintiff was working out of GPC's Gibbs Road location. Weldon had never given Plaintiff an evaluation.

As the hiring manager for the Cable Locator position, Weldon put together the committee which would interview the applicants. He selected Phyllis Austin, a Senior Region Support Representative (white female) who worked at the Gibbs Road location which was Plaintiff's home base. He

also selected Tyre Hester, an Engineering Associate I (white male), and Terry Smith, a Cable Locator (black male).

Prior to the interview date, candidate profiles were prepared for each of those applicants who were to be interviewed. The candidate profile is a form which provides information such as hire date, current job, and other identifying data. It lists the full employment history of the applicant, as well as the incompany self-improvement courses taken by the applicant. Presumably, each of the interviewers was furnished with the candidate profile before the interview.

Human Resources Representative Danielle James observed the interviews. James Dec. P 3. Before the interviews, Ms. James advised the selection committee about the mechanics of the selection process and instructed the committee members that the candidates' race and other impermissible factors were not to be considered during the selection process. *Id.* The committee ultimately selected one candidate, Carey Rutledge, for this position. Weldon Dec. PP 9, 12.

Each applicant was interviewed individually. The interview was based on questions contained in a structured interview questionnaire, which had been prepared by Defendants' human resources department. Each interviewer had a copy of the questionnaire. The first question was, "Please tell me about your background and experience for this position." The final question was, "Why do you want this job?" The remaining six questions addressed various attributes deemed important to the job – initiative, customer focus, communication, and safety. All were open-ended questions. For example, one of the "initiative"

questions was, "Sometimes daily emergencies keep us from getting our most important work done. What are some ways you have found to stay on track and meet scheduled deadlines?" The "customer focus" question was, "Describe what 'meeting the needs of the customer' means to you. Tell me about a time when you met the needs of a customer." The structured interview questionnaire contained spaces for each interviewer to score the applicant's response to questions 2 through 7, the low score for each answer being 0 and the top score being 3. Each of the interviewers made notes in spaces provided on the questionnaire, presumably while the applicant was talking, during the respective interviews. The forms pertaining to Plaintiff are in the record. *See* Weldon Dep. Exhs. 7-11. The record does not clarify exactly when the interviewers scored the responses – whether at the conclusion of each interview, or at a later time.

The Court notes that Plaintiff has not questioned the job-relatedness of the questions asked during the interview.

Following the interviews, the four committee members were asked to place the seven applicants in rank order from 1 to 7 (1 being the top ranked applicant) based on "gut feel" only. According to the interview scoring summary, this is an optional step in the process. Weldon, Hester and Smith ranked Plaintiff as a "1". Smith also gave a "1" ranking to applicant Jim Brown. Ms. Austin ranked Edwards as "4".

Applicant Jim Brown (white male) received rankings of 3, 1, 2 and 1, putting him in second place (if the number of "1" ratings is controlling) or tied for first place (if the aggregate rankings are deemed most relevant: Plaintiff 1

+ 4 + 1 + 1 = 7; Brown 3 + 1 + 2 + 1 = 7). Cary Rutledge, a white male applicant, was in next place with rankings of 2, 2, 3 and 5.

The record does not clarify at what point the interviewers' scores of the answers to the structured questions were tallied. The tally was done by the facilitator, Danielle James, based on the scores reflected in the structured interview questionnaire. With 3 being the maximum points awardable for each answer, and with four individuals scoring each answer, the maximum points awardable for a particular answer to a question was 12. Tallies were done for all seven of the applicants who were interviewed. The scores ranged from 69 points for Jim Brown, to a low of 55 points. Edwards' point count was 61 and the point count for Carey Rutledge was 62.5.

The committee discussed the merits or demerits of each of the top 3 applicants – Brown, Plaintiff, and Rutledge. It is undisputed that at this point, Ms. Austin stated that she had often seen Plaintiff on the phone and visiting with other employees, whereas the other Cable Locators were in the office only briefly at the beginning and ending of the workday. *See* Austin Dec. P 6. Plaintiff's knowledge of the job and ability to do the job was not questioned. Weldon stated that prior to the committee interviews he had the feeling that Plaintiff probably would be the top applicant for the position. Weldon Dep. 33, 98.

Committee member Smith opined that Plaintiff was the top-qualified applicant because he had held the same position in a temporary capacity; thus, his knowledge of the job was superior. At some point, the committee's facilitator Danielle James made negative comments about Plaintiff's behavior during the interview. Smith objected,

apparently appropriately, that Ms. James' expression of views was not appropriate.

The committee then discussed the fact that during his interview candidate Brown had said that the trip to Atlanta for the interview had taken longer than he had expected, and that plus his back injury made him think he might not take the job if it was offered to him. The committee therefore determined – apparently by mutual consensus – that the job would not be offered to Brown based on his expression of disinterest but rather should be offered to Rutledge, who the committee by consensus deemed to be the top applicant.

Weldon accepted the committee's recommendation. As the hiring manager for the position he had the discretion to reject the committee's recommendation, but he testified that his customary practice was to accept it. He could not recall an instance when he had not accepted a committee recommendation. Weldon Dep. 41.

Plaintiff does not provide evidence countering the claim of low productivity or frequent absences which according to Defendant constituted 20% of Edwards' work days while he was being supervised by Weldon. He does point out, with no dispute by Defendants, that all absences were excused on account of doctors' appointments or vacation time. Edwards also offers the declaration of Tensley Usher, a Cable Locator, who opines that Cable Locators have frequent need to use the telephone, that he worked with Plaintiff during the time in question and that in his opinion, Plaintiff was a productive employee.

Plaintiff applied for a number of other job postings through Defendants' internal job posting and application system, JobNet. Edwards Dep., Vol. II, at 319-20; Edwards

Dep., Vol. III, at 80-81, 109-10. In one of his depositions, Plaintiff testified that there are twelve job types, in addition to the Cable Locator position discussed above, that he contends are at issue in this case. Edwards Dep., Vol. III, at 91-92 & Exhibit 1. These job types are as follows: Power Delivery Specialist; Construction Safety Coordinator; Distribution Supervisor; Operator I; Drafter; Operating Associate I; Operation Services Representative; Service Coordinator; Shift Team Leader; Support Representative; Customer Service Representative; and Lighting Coordinator. *Id.* In his response to Defendants' motion for summary judgment, Plaintiff asserted that he was also denied a Power Delivery Supervisor position because of his race.

On July 21, 2000, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ["EEOC"] alleging that he had been subjected to discrimination based on his race. Edwards Dep., Vol. I, at 192; Edwards Dep., Vol. II, at 217-19. Plaintiff then requested and received a Dismissal and Notice of Rights on July 27, 2000, the same day the instant lawsuit was filed. Edwards Dep., Vol. II, at 217.

II. Defendants' Summary Judgment Motion

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [Defendant] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To prevail in its motion for summary judgment, Defendants must show that the evidence is insufficient to establish an essential element of Plaintiff's

case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In ruling on Defendants' motion, the court must view the evidence in a light most favorable to Plaintiff. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). If Defendants make a sufficient showing, then Plaintiff "must come forward with 'specific facts showing that there is a genuine issue for trial. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (*quoting* Fed.R.Civ.P. 56(e)).

Under Title VII, an employer may be found liable for unlawful discrimination under any one of three discrete theories: disparate treatment discrimination, pattern and practice discrimination, or disparate impact discrimination. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1273 (11th Cir. 2000).[2] The first two theories require proof of discriminatory intent, while the third does not. *Id.* at 1273. Defendants argue that summary judgment is appropriate here because Plaintiff has failed to establish a claim of intentional discrimination or disparate impact. Plaintiff objects, arguing that there are genuine issues of material fact precluding summary judgment as to both Plaintiff's intentional discrimination and disparate impact claims. Because the theories place different burdens on the parties, the Court will address them separately.

---

[2] Section 1981 provides a cause of action only for claims of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976); *Ferrill v. Parker Group. Inc.*, 168 F.3d 468, 472 (11th Cir. 1999).

A. Intentional Discrimination

To establish a prima facie case of race discrimination under a disparate treatment theory, Plaintiff may offer either direct or circumstantial evidence of discriminatory intent. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Alexander v. Fulton County. Ga.*, 207 F.3d 1303 (11th Cir. 2000). If the plaintiff presents direct evidence of discrimination, the defendant is then required to prove by a preponderance of the evidence that it would have taken the adverse employment action even in the absence of discrimination.

To make a prima facie case using circumstantial evidence, a plaintiff may use the test established in *McDonnell Douglas*.[3] A plaintiff may establish a prima facie case by demonstrating 1) that he belongs to a protected class under Title VII; 2) that he was qualified for and applied for the job; 3) that he was rejected; and 4) that others who were not members of the protected class were promoted. *Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997).

If the plaintiff provides sufficient circumstantial evidence to support a prima facie case, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment

[3] The *McDonnell Douglas* standard for a prima facie case also is applicable in employment discrimination suits brought under 42 U.S.C. § 1981. *Sledge v. Goodyear Dunlop Tires North America. Ltd.*, 275 F.3d 1014 (11th Cir. 2001).

action. *McDonnell Douglas*, 411 U.S. at 802-03. The defendant's burden is "exceedingly light" and is "one of production, not proof." *Id.* at 802. If the defendant satisfies its burden, the presumption of discrimination is eliminated and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. *Id.*

A plaintiff may also use statistical evidence to establish a prima facie case of discrimination or pretext. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 952 (11th Cir. 1991). Statistics may be used to establish an individual plaintiff's claim that a pattern or practice of discrimination existed, or simply to bolster the plaintiff's circumstantial evidence of individual disparate treatment. Under the pattern and practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). Even if the statistical evidence is insufficient to meet this standard, evidence establishing a discriminatory pattern "is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue." *Parker v. Burnley*, 693 F. Supp. 1138, 1153 (N.D.Ga. 1988) (internal quotation marks and citation omitted). Whether the plaintiff argues that the statistical evidence supports a pattern or practice claim or simply constitutes evidence of disparate treatment, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown*,

939 F.2d at 952 (citing *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987)).

1. Disparate Treatment

In their motion, Defendants apparently do not argue that Plaintiff has failed to establish a prima facie case. Instead, Defendants assert that they have offered legitimate non-discriminatory reasons to rebut any presumption of discrimination in the decisions not to hire or promote Plaintiff. Defendants argue that summary judgment is appropriate because Plaintiff has failed to provide sufficient evidence to establish that these reasons are pretextual. In response, Plaintiff points to facts in the record which he contends raise genuine issues of material fact precluding summary judgment.[4] It is therefore necessary to determine whether Plaintiff has provided sufficient evidence to raise a genuine issue of material fact with respect to pretext for any of the positions.

Cable Locator

Job Requisition Number 010279

Defendants assert two reasons for their decision not to hire Plaintiff for this position: that Plaintiff did not perform as well in the interview as the successful candidate and that Plaintiff's performance in the temporary Cable

[4] Plaintiff alleges that he was discriminated against with respect to multiple openings in fourteen positions. Plaintiff now argues that Defendants' asserted legitimate, non-discriminatory reasons should not be considered because Defendants included them in an appendix to their motion rather than within the text of the motion itself. The Court rejects this argument.

Locator position was subpar. Plaintiff argues that he can establish pretext by showing that he was more qualified than the successful candidate and that Defendants' proffered reasons for the hiring decision are false.

While hiring a less qualified person is probative of discriminatory motivation, "a plaintiff cannot prove pretext by simply arguing or even by showing that he was better qualified than the [person] who received the position he coveted. A plaintiff must show not merely that the defendant's employment decisions were mistaken but that they were in fact motivated by race." *Alexander*, 207 F.3d at 1339-40. Thus Plaintiff "must adduce evidence that the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." *Cofield v. Goldkist*, 267 F.3d 1264, 1268 (11th Cir. 2001) (internal quotation and citations omitted). While Plaintiff provided evidence from which a reasonable jury could find that he had more technical skills and experience than the successful candidate, the alleged disparity in qualifications is insufficient to establish by itself that the decision to hire the successful candidate was motivated by race.

Nor is Plaintiff's other evidence sufficient to raise a genuine issue as to pretext. Plaintiff claims that he can show that Defendants' asserted legitimate non-discriminatory reasons for the decision not to hire Plaintiff are false. Defendants' first reason is that the successful candidate performed better than Plaintiff in the interview. Weldon testified that "while the panel recognized that [Plaintiff] had experience, some members of the panel observed that [Plaintiff] displayed an overly casual approach to the interview process. He seemed to believe he should automatically get the job just because he was temporarily performing a Cable Locator assignment." Weldon Dec. P 11. Austin

testified that she and other members of the panel "believed [Plaintiff] displayed presumptuous behavior during the interview. He acted as though he was interviewing the panel as to why he should take the job rather than showing the panel that he should be selected for the position. . . . His overall demeanor struck me as inappropriate for the situation." Austin Dec. P 8.

Plaintiff argues that the following facts, which are undisputed, create a genuine issue as to pretext precluding summary judgment: that the only black member of the selection panel disagreed with negative comments made about Plaintiff's interview performance (Smith Dec. P 5); that three out of the four panel members rated Plaintiff as the top candidate immediately after the interviews were completed (Weldon Dep. 98-99); and that a panel member's interview notes indicated that Plaintiff performed well during the interview and that Plaintiff's performance was very close to that of the person hired (*Id.* at 99, 103).

While this evidence is arguably sufficient to establish that the panel disagreed about Plaintiff's interview performance, Plaintiff has failed to establish pretext with respect to Defendants' second asserted reason for the decision not to hire Plaintiff: that Plaintiff's performance in the temporary cable locating position was subpar. Plaintiff's supervisor testified that "the amount of work [Plaintiff] completed in the temporary Cable Locator position was low as compared to other Cable Locators." Weldon Dec. P 4. According to Defendants, one of the panel members reported during the selection process that she had often seen Plaintiff on the phone and visiting with other employees while other Cable Locators were in the office only briefly at the beginning and ending of the work day.

> Although other Cable Locators typically were in the office only briefly a couple of times during the day to pick up their work assignments, [Plaintiff] seemed to be in the office much more frequently and for longer periods of time than other Cable Locators. I observed [Plaintiff] spending work time talking on the telephone and visiting with other employees.
>
> [Plaintiff] was also absent from work on a regular basis, sometimes without advanced notice. These frequent absences made it even more important to use his time at work productively. My impression was that [Plaintiff] did not seem to be trying very hard to succeed at the Cable Locator job. He did not seem motivated to get the work done efficiently even though there were many work orders for Cable Locators. My impression was confirmed when I heard complaints from other Cable Locators that [Plaintiff] was not getting his work done, and that they had to pick up part of his workload.
>
> I shared this information with the interview panel during our discussion of [Plaintiff's] suitability for the Cable Locator position. While [Plaintiff] had experience as a Cable Locator, I believed it was important for the Committee to know about [Plaintiff's] poor work habits. I felt this information was relevant to the decision.

Austin Dec. PP 5-7; *see also* Weldon Dec. P 10.

Plaintiff argues that the following evidence creates genuine issues of material fact as to whether these reasons are a pretext for discrimination. First, Plaintiff points to evidence that Plaintiff's supervisor considered him one of the best qualified for the position at issue before the interview and had a "gut instinct" that Plaintiff was the

top applicant for the position. Weldon Dep. at 33, 98. Plaintiff challenges Defendants' assertion of low productivity with the testimony of another Cable Locator that the position requires extensive telephone use and that Plaintiff generally performed his job well and did not overuse the telephone. Usher Dec. PP 7-10.

The proper pretext analysis is whether the plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997) (internal quotation mark and citations omitted). Defendants are certainly entitled to employ subjective criteria such as an interviewer's response to an applicant or co-workers' observations about an applicant's work habits their in hiring process. *Murphy v. Yellow Freight System. Inc.*, 832 F. Supp. 1543, 1548 (N.D.Ga. 1993) ("The use of subjective factors in making employment decisions cannot be sufficient to support a finding of discrimination."). Plaintiff contends that the subjective reasons asserted are not credible based on evidence in the record. However, Plaintiff has not come forward with any evidence to establish that the decisionmakers with respect to this position did not find that Plaintiff's absences and low productivity made him a less attractive candidate. Plaintiff's evidence is thus insufficient to permit a reasonable factfinder to conclude that the reasons given by Defendants were a pretext for intentional discrimination.

Plaintiff has also provided statistical evidence of racial imbalances in Defendants' hiring and promotion practices as evidence of pretext. Specifically, Plaintiff has offered statistical reports to support his claim that Defendants' hiring and

promotion practices had a discriminatory effect on black employees. Plaintiff argues that the reports of his expert, Dr. Madden, which find statistically significant disparities in the promotion of black employees relative to white employees, are evidence from which a reasonable fact-finder could determine that intentional discrimination occurred. Defendants contend that Plaintiff's generalized statistics are insufficient to support Plaintiff's claims of intentional discrimination.

As the Supreme Court has noted, while statistical evidence may allow the District Court to "determine . . . that the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices . . . such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." *McDonnell Douglas*, 411 U.S. at 805 n.19 (internal quotation marks and citation omitted). In this case, Plaintiff's statistical evidence is insufficiently tailored to support his individual claims.

Plaintiff's statistics compare the promotion rate of employees within the same pay grade who perform similar job functions; however, these statistics generally fail to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to hiring decisions. Plaintiff does not provide statistics comparing employees with equivalent work experience in specific job categories or job progressions, or outcomes for those employees, both black and white, who had actually applied for posted

positions challenged by Plaintiff. Plaintiff relies instead on a statistical analysis of a company-wide data pool and makes no attempt to narrow the data pool to the locations in which he worked or the positions which he challenges. As this Court noted in the order denying class certification, the probative value of Plaintiff's statistical evidence is therefore highly questionable, in significant part due to the treatment of factors such as experience, education, and specific promotion processes. *Cooper v. Southern Company*, 205 F.R.D. 596, 613-14 (N.D.Ga. 2001).

The analytical deficiencies of Plaintiff's statistics diminish the probative value of this evidence such that it cannot by itself support a claim of disparate treatment. *See Brown v. American Honda Corp.*, 939 F.2d 946, 952 (11th Cir. 1991) (holding that summary judgment was appropriate where plaintiff's statistical evidence, which lacked specific analytical foundation and thus failed to show that employer maintained discriminatory intent, was insufficient to establish prima facie case or pretext); *Hawkins v. Ceco Corp.*, 883 F.2d 977, 985 (11th Cir. 1989) (holding that plaintiff's statistical evidence failed to establish prima facie case or pretext where evidence failed to make specific analytical comparisons); cf. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977) (holding that plaintiff's evidence of statistical disparities in hiring, promotion and compensation was sufficient to support claim of intentional discrimination where the employment decisions were based on completely subjective criteria).[5]

[5] Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Because Plaintiff has failed to establish pretext with respect to all of Defendants' asserted reasons, Defendants are entitled to summary judgment with respect to this claim. *See Chapman v. A.I. Transport*, 229 F.3d 1012 (11th Cir. 2000); *Combs*, 106 F.3d at 1529.

Job Requisition Number 008603

Defendants assert that Plaintiff was not awarded a position at this opening because the opening was rescinded before being filled. Defendants cite to the declaration of Jim Weldon to support this position. While Weldon's declaration does not provide any evidence with respect to this opening, Weldon's deposition testimony confirms that the position was in fact rescinded. Weldon Dep. 71-72. Further, Plaintiff has failed to respond specifically to Defendants' motion for summary judgment with respect to this opening. Defendants are therefore entitled to summary judgment on this claim. *See Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to Plaintiff's promotion claim.

Plaintiff's failure to specifically plead facts with respect to the remaining positions precludes Plaintiff's pursuit of claims related to such positions. *See Coon v. Georgia Pacific Co.*, 829 F.2d 1563, 1569 (11th Cir. 1987) (holding that district court did not err when it refused to allow plaintiff to proceed on individual discrimination claims not pleaded in her complaint). However, because Plaintiff did specify the following positions during discovery, the Court

will review Plaintiff's claims out of an abundance of caution.

Operator I (Job Requisition Number 010284)[6]

Defendants offer two legitimate, non-discriminatory reasons for the decision not to interview and thus not to hire Plaintiff for this position: that Plaintiff received a negative reference from his supervisor and that the successful candidates were believed to be the most qualified applicants for the position. Defendants' Motion for Summary Judgment, Exhibit A at 11; Johnson Dec. P 5; Lawrence Dec. P 5, Specifically, Defendants provided evidence that Plaintiff was not selected for an interview because Plaintiff's supervisor indicated to the hiring manager for this position that Plaintiff had recurring attendance problems. Lawrence Dec. P 5. Defendants also described the specific qualifications and experience the selection committee relied upon in determining that the successful candidates were best-qualified for the position. Johnson Dec. P 5.

To establish pretext, Plaintiff does not address the evidence that he received a negative reference but instead contends that the successful candidates were not qualified for the position. In support of his attempt to create a genuine issue of material fact as to whether these candidates were

[6] Plaintiff applied for several Operator I positions during the period in question. Defendants provided legitimate, nondiscriminatory reasons for each of these positions. *See* Defendants Motion for Summary Judgment, Exhibit A. Because Plaintiff provides arguments as to pretext for only one of these openings, the Court will consider only this opening in its analysis. Defendants' Motion for Summary Judgment is GRANTED as to the remaining Operator I positions.

qualified, Plaintiff relies upon job posting documents and performance evaluations of the successful candidates.[7] These performance evaluations indicate that the successful candidates received less than stellar reviews in some of the areas listed as job requirements in the relevant job posting.[8] However, that Defendants suggested improvement in the areas at issue – safety skills and ability to participate in a team environment – does not establish that Defendants did not believe that the successful candidates were qualified for the position. Plaintiff makes no attempt to indicate what Defendants considered the requisite level of skill in the areas at issue and thus

---

[7] Defendants have filed a motion to strike this evidence, arguing that it is inadmissible because it is unauthenticated and constitutes inadmissible hearsay. However, this argument is unavailing because there is no requirement' that evidence be presented in admissible form as long as the evidence would be admissible at trial. *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996). The evidence at issue would likely be admissible at trial. *See, e.g.*, 31 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure § 7105 (2000) ("Authentication can also be accomplished through judicial admissions such as . . . production of items in response to . [a] discovery request."); F.R.E. 803(6) (hearsay exception for business record); F.R.E. 801(d)(2)(D) (admission by party opponent does not constitute hearsay); F.R.E. 806 (hearsay exception for purposes of impeachment).

[8] Defendants have filed a motion to strike this evidence, arguing that it is inadmissible because it is unauthenticated and constitutes inadmissible hearsay. However, this argument is unavailing because there is no requirement' that evidence be presented in admissible form as long as the evidence would be admissible at trial. *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996). The evidence at issue would likely be admissible at trial. *See, e.g.*, 31 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure § 7105 (2000) ("Authentication can also be accomplished through judicial admissions such as . . . production of items in response to [a] discovery request."); F.R.E. 803(6) (hearsay exception for business record); F.R.E. 801(d)(2)(D) (admission by party opponent does not constitute hearsay); F.R.E. 806 (hearsay exception for purposes of impeachment).

cannot establish that the successful candidates did not meet Defendants' requirements.

Because Plaintiff has failed to come forward with evidence from which a reasonable jury could determine that Defendants' reasons are pretext for discrimination, Defendants' motion for summary judgment is GRANTED with respect to this position.

Operator II (Job Requisition Number 008845)[9]

Defendants offer the following reason for the decision not to hire Plaintiff for this position: that the successful candidates were believed to be more qualified than Plaintiff and other applicants for the position. Defendants' evidence shows that the hiring manager narrowed the list of applicants by examining their resumes and job history profiles using the specific criteria set out for this position and by conducting informal surveys of people who knew or had worked with individual applicants. The hiring manager considered the following job-related factors in determining which applicants to interview: previous positions held, training completed, educational achievements, and previous job performance. Plaintiff was not selected for an interview. Defendants contend that the hiring committee made a consensus recommendation to hire the successful candidates based on their relevant experience, demonstrated

[9] Plaintiff applied for several Operator II positions during the period in question. Defendants provided legitimate, nondiscriminatory reasons for each of these positions. *See* Defendants' Motion for Summary Judgment, Exhibit A. Because Plaintiff provides arguments as to pretext for only one of these openings, the Court will consider only this opening in its analysis. Defendants' Motion for Summary Judgment is GRANTED as to the remaining Operator II positions.

understanding of position requirements, and demonstrated ability to handle the demands of the job.

Plaintiff now asserts that he can show pretext by demonstrating that one of the successful candidates was not qualified for the position. Plaintiff argues that this candidate did not have the knowledge of power systems operations and basic electrical theory stated as a qualification in the job posting, relying on a post-hiring development plan for this candidate suggesting that the candidate attend a seminar on basic electricity.[10] Again, however, Plaintiff fails to provide any evidence with respect to how much weight Defendants placed on this job skill. That Defendants suggested additional training for the successful candidate does not establish that Defendants did not believe that the successful candidate was qualified for this position.

Plaintiff has therefore failed to provide evidence establishing a genuine issue of material fact as to pretext. Accordingly, Defendants' motion for summary judgment with respect to this position is GRANTED.

Power Delivery Specialist (Job Requisition Number 007486)

Plaintiff first identified this position as one in which he was discriminated against in his response to Defendants'

[10] Plaintiff also appears to argue that he was more qualified than this candidate, asserting that his Lineman position required more knowledge and exposure to electrical systems than the successful candidate's Mechanic position. However, Plaintiff fails to point to any evidence in the record to support this argument. Plaintiff's own evaluation of whether his experience made him more qualified than the successful candidate is insufficient to establish pretext precluding summary judgment.

motion for summary judgment. Because Plaintiff asserts that he has both direct and circumstantial evidence of discrimination with respect to this position, the Court will first address whether Plaintiff has presented evidence sufficient to state a prima facie case.

In this case, Plaintiff asserts as direct evidence of discrimination that the alleged decisionmakers for this position permitted nooses to be hung in their facilities for years, including when this opening was being filled, and that these decisionmakers shredded evidence related to the hiring process for this position. To support these claims, Plaintiff offers the deposition testimony of Defendants' employees that they had seen the nooses but had not taken action to have them removed and that they had shredded documents in the course of preparing documents for production in this case.

This testimony does not constitute direct evidence of discrimination. To make a prima facie case using direct evidence, Plaintiff must come forward with evidence that, if believed, proves the existence of discrimination without inference or presumption. *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999). "Direct evidence is composed of only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of some impermissible factor." *Id.* (internal quotations and citation omitted). However, if the alleged conduct "at best merely suggests a discriminatory motive, then it is by definition only circumstantial evidence." *Id.* That these witnesses saw the nooses but did nothing about them does not constitute direct evidence of discrimination because it does not clearly establish the decisionmakers' intent to discriminate. Rather, this evidence requires an inference that because these men did not take action to remove the

nooses, they maintained a racial animus and another inference that such animus affected the decision not to hire Plaintiff. Nor does Plaintiff's evidence of document shredding constitute direct evidence of discrimination. Instead, it requires an inference that these workers shredded the documents to conceal that the decision not to hire Plaintiff was based on his race.

However, Plaintiff may be able to state a prima facie case of discrimination through the use of circumstantial evidence. Plaintiff can clearly establish that he belongs to a protected class, that he applied for the job, that he was rejected and that others who were not members of the protected class were promoted. *See Denney*, 247 F.3d at 1183. There is some question as to whether Plaintiff was qualified for the position. While Plaintiff contends that he meets some of the articulated qualifications for the position, Defendants produced undisputed evidence that Plaintiff's application lacked the repair shop and mechanical experience required for the position, suggesting that Plaintiff was not qualified for the position.

In any case, Defendants have come forward with a legitimate, non-discriminatory reason – that the successful candidate was the most qualified applicant for the position – sufficient to overcome any presumption of discrimination.[11] Defendants contend that the hiring manager considered the following factors in determining which

[11] Plaintiff argues that the Court should not consider Defendants' asserted non-discriminatory reason because it was asserted for the first time in Defendants' reply brief. The Court rejects this argument in light of the fact that Plaintiff asserted facts with respect to this position for this first time in Plaintiff's Response to Defendants' Motion for Summary Judgment.

applicants to interview: whether the candidate had multiple years of experience as a journeyman, whether the candidate was familiar with the major functions of the repair shop, and whether the candidate was technically proficient in his own job. The hiring manager indicated that the position required extensive repair shop and mechanical experience because it was a supervisory position. Defendants assert that Plaintiff was not selected for an interview because his application reflected neither familiarity with the repair shop nor a mechanical background and because his Lineman position did not involve repair shop or mechanical experience.

Plaintiff contends that he can establish pretext by showing that the successful candidate was less qualified than he was. However, plaintiff does not provide any specific evidence with respect to either his or the successful candidate's qualifications for this position. Plaintiff's own evaluation of his qualifications does not support a finding of pretext. *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1332-33 (11th Cir. 1998).

Nor can Plaintiff establish pretext with his evidence that some of the alleged decisionmakers were aware of the nooses but did not take action to remove them. Statements or conduct showing a supervisor's racial animus toward the plaintiff may be significant evidence of pretext, once the plaintiff has set out a prima facie case. *Jones v. Bessemer Carraway Medical Center*, 137 F.3d 1306, 1313 (11th Cir. 1998) (citing *Smith v. Horner*, 839 F.2d 1530, 1536-37 (11th Cir. 1988)), mod'd in part on other grounds, 151 F.3d 1321. Plaintiff's allegations suggest that these employees tolerated discriminatory conduct; however, such evidence is insufficient to establish pretext. To establish pretext, Plaintiff must show not only that racial animus existed

but that such animus tainted the ultimate decisionmaker's action. *See, e.g., Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1248 (11th Cir. 1998). Plaintiff must therefore prove that such discriminatory animus was an actual cause of the decision not to hire Plaintiff. *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1331 (11th Cir. 1999). Plaintiff has failed to point to any evidence that either Sanders or Davis was involved in the decision not to hire Plaintiff for the position at issue or that Cawthorne, the hiring manager who made the decision not to interview Plaintiff, had knowledge of the nooses.

Plaintiff has presented evidence that Bagwell, his direct supervisor at one point, was aware of the nooses. Bagwell was responsible for Plaintiff's performance evaluations, which were considered by Cawthorne in the employment decision. However, Bagwell's evaluation was overwhelmingly positive. Further, Plaintiff does not argue, nor does the evidence suggest, that Cawthorne relied solely on Bagwell's evaluation in making the decision not to interview Plaintiff. Thus, Plaintiff cannot use this evidence to establish pretext. Cf. *Llampallas*, 163 F.3d at 1248 (holding that Plaintiff may establish pretext by showing that decisionmaker merely rubberstamped discriminatory recommendation without conducting his own investigation of the facts surrounding Plaintiff's employment); *Pennington v. City of Huntsville*, 261 F.3d 1262, 1270 (11th Cir. 2001) (holding that where decisionmaker conducts his own investigation and makes an independent decision, his decision is free of the taint of a biased subordinate employee); *Bessemer Carraway*, 151 F.3d 1321 (holding that supervisor's racially motivated statements were insufficient to support prima facie case where decisionmaker did not rely solely on supervisor's

reports of plaintiff's misconduct but made independent investigation).

Similarly, Plaintiff's evidence of document shredding does not support a finding of pretext. "In this circuit, an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith." *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997). The Court has already determined that there was no evidence of bad faith. *Cooper v. Southern Co.*, No. 00-2231 (N.D.Ga. Feb. 5, 2001).

Because Plaintiff has failed to provide evidence sufficient to support a finding of pretext, Defendants' motion for summary judgment is GRANTED with respect to this position.

Operating Services Representative (Job Requisition Numbers 008344 and 008352)[12]

Defendants assert the following reason for the decision not to hire Plaintiff for these openings: that the successful candidates were believed to be more qualified than Plaintiff and other applicants. Defendants provide evidence to establish that the selection process was fair and that race was not considered in the employment decision and thus met the burden of producing a legitimate, non-discriminatory

[12] Plaintiff applied for multiple Operating Services Representative positions during the period in question. Defendants provided legitimate, non-discriminatory reasons for each of these positions. *See* Defendants' Motion for Summary Judgment, Exhibit A. Because Plaintiff provides pretext arguments for the June, 1999, openings only, the Court will consider only these openings in its analysis. Defendants' Motion for Summary Judgment is GRANTED as to the remaining Operating Services Representative position.

reason sufficient to overcome the presumption of discrimination. Plaintiff's assertions that he was qualified for the position and that the successful candidate lacked computer skills may be construed as an attempt to establish that Defendants' asserted reason for the decision was pretextual. However, Plaintiff has failed to point to any evidence establishing that computer skills were required for this position. Thus, Plaintiff's evidence that a development plan for the successful candidate suggested computer training is not sufficient to support a finding that Defendants did not believe that this candidate was qualified for the position. Therefore, Defendants' motion for summary judgment is GRANTED with respect to this position.

Shift Team Leader

In their motion for summary judgment, Defendants state that the Shift Team Leader position is one in which Plaintiff alleges he was discriminated against. While Defendants have moved for summary judgment with respect to all of Plaintiff's claims, Defendants have not asserted a non-discriminatory reason for any employment decision involving Plaintiff nor have they pointed to any evidence with respect to this position. However, Plaintiff does not address this deficiency is [sic] his response to Defendants' motion, suggesting that this position is no longer at issue. Plaintiff is therefore deemed to have abandoned his claim with respect to this position and Defendants are entitled to summary judgment.

Remaining Positions

Upon review of the record, the Court finds that Defendants have asserted legitimate, non-discriminatory reasons for the decisions not to hire Plaintiff for any of the remaining positions in which Plaintiff asserts Defendants discriminated against him.[13] Plaintiff has made no attempt to point to any specific evidence suggesting pretext as to any of these decisions. In his attempt to avoid summary judgment on these claims, Plaintiff instead argues that he can prove disparate treatment with statistical evidence of discrimination. However, as discussed above, the statistical evidence provided by Plaintiff is insufficient in the absence of any other evidence to support a finding of pretext with respect to any of Plaintiff's claims. Accordingly, Defendants' motion for summary judgment is GRANTED with respect to these claims.

2. Pattern and Practice

Plaintiff has failed to create a genuine issue of material fact as to whether a pattern or practice of discrimination existed. As discussed above, Plaintiff has provided statistical evidence in an attempt to establish a claim of pattern and practice discrimination. While "statistics as to [Defendants'] employment policy and practice may be helpful to a determination of whether [Defendants'] refusal to [ ]hire [Plaintiff] in this case conformed to a general pattern of discrimination against blacks," *McDonnell Douglas*, 411 U.S. at 805, to have probative value,

[13] Construction Safety Coordinator; Distribution Supervisor; Drafter; Service Coordinator; Shift Team Leader; Support Representative; Customer Service Representative; and Lighting Coordinator.

statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re: Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1312 (11th Cir. 1999). The analytical deficiencies of Plaintiff's statistical evidence, discussed above, render this evidence insufficient to support a pattern or practice claim.

In addition to Plaintiff's expert reports, Plaintiff offers Defendants' internal personnel documents to support his argument that Defendants maintained a pattern or practice of compensation discrimination. While these documents indicate some disparity in compensation between black and white employees, these documents are not probative as to whether Defendants intentionally discriminated against Plaintiff during the period in question. The documents indicate average salaries of employees divided by racial classification but do not control for factors such as education, experience or skill level and thus cannot prove that Defendants discriminated on the basis of race. Plaintiff has thus failed to come forward with evidence sufficient to prove that intentional discrimination was Defendants' "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75. Accordingly, the Defendants' motion for summary judgment with respect to Plaintiff's pattern or practice claim is GRANTED.

B. Disparate Impact

Finally, Defendants argue that Plaintiff has failed to establish a claim of disparate impact under Title VII. To

establish a claim under a theory of disparate impact, Plaintiff must show 1) the existence of a statistically significant disparity among members of different groups affected by employment decisions; 2) the existence of a specific, facially neutral employment practice; and 3) the existence of a causal nexus between the specific, facially neutral employment practice and the statistically significant disparity. 42 U.S.C. § 2000e-2(k); *Joe's Stone Crab*, 220 F.3d at 1274; *In re: Alabama*, 198 F.3d at 1311-14. Defendants contend that Plaintiff's statistics, which are not adjusted to account for differences among various positions and the respective skill and education levels required, are insufficient to establish a statistically significant disparity required to state a claim. Plaintiff argues in response that his statistical evidence is sufficient to create a genuine issue of material fact precluding summary judgment.

As evidence of a facially neutral policy, Plaintiff points to Defendants' use of subjective criteria in determining which applicants to interview and thus which applicants to hire. While Plaintiff has failed to identify in his response to Defendants' motion for summary judgment a specific policy which has had an impermissibly discriminatory impact on him, Plaintiff provided evidence in his motion for class certification to support his claim that Defendants allowed the use of subjective criteria by decisionmakers in each of its subsidiaries.

However, showing that Plaintiff was subject to subjective policies does establish a prima facie case of disparate impact. Plaintiff must also show the existence of a causal nexus between these specific, facially neutral employment practices and a statistically significant disparity. "'Plaintiff must offer statistical evidence of a kind and degree sufficient

to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'" *Joe's Stone Crab*, 220 F.3d at 1275 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988)). In this case, Plaintiff has failed to establish that the use of subjective hiring criteria caused a statistically [sic] disparity within the promotions for which he applied.

To establish the first element of a disparate impact claim, Plaintiff relies on his expert's report which finds statistically significant disparities in the promotion of black employees relative to white employees. As Defendants note, however, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re: Alabama*, 198 F.3d at 1312. Plaintiff's expert reports an over-all statistical disparity between black and white employees in hiring and promotion by Defendants. However, Plaintiff's statistics – which compare promotions among employees within the same pay grade who perform similar job functions – fail to distinguish between positions in which Defendants' decisionmakers applied the express objective hiring factors and those in which the decisionmakers employed subjective criteria. Further, Plaintiff's evidence generally fails to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to promotions. Plaintiff's evidence also fails to compare outcomes for those employees who actually applied for posted positions. Nor does Plaintiff's evidence distinguish between competitive and

non-competitive promotions; such deficiency further undermines the probative value of Plaintiff's statistics with respect to promotions. *See Forehand v. Florida State Hospital at Chattahoochee*, 89 F.3d 1562, 1572-73 (11th Cir. 1996).

Because of these deficiencies, Plaintiff cannot establish the existence of a causal nexus between a specific, facially neutral employment practice and a statistically significant disparity. *See, e.g., Joe's Stone Crab*, 220 F.3d at 1279. In *Joe's Stone Crab*, the Eleventh Circuit found that the EEOC failed to establish a disparate impact claim where the EEOC presented no evidence that the employer's use of subjective criteria caused minority applicants not to apply or that minority applicants for positions at issue were disadvantaged by the subjective criteria. Similarly, in this case Plaintiff fails to point to any evidence linking Defendants' use of subjective criteria to the alleged statistical disparity. Therefore, Defendants' motion for summary judgment with respect to Plaintiff's disparate impact claim is granted. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir. 1993) (holding that employer is entitled to summary judgment where plaintiff fails to provide evidence necessary to prove at trial that there is disproportionate impact of employer's policy on black employees).

For the reasons stated above, Defendants' motion for summary judgment is GRANTED.

So ORDERED, this 31 day of March, 2003.

ORINDA D. EVANS

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 14 2005
OFFICE OF THE CLERK

No. 04-88

In the

Supreme Court of the United States

CORNELIUS COOPER, *et al.*,

Petitioners,

v.

SOUTHERN COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II, PAGES 199a to 415a

MICHAEL B. TERRY
Counsel of Record
JOSHUA F. THORPE
STEVEN J. ROSENWASSER
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree St., NW
Atlanta, Georgia 30309
(404) 881-4100

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, AND CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., AND SOUTHERN COMPANY ENERGY SOLUTIONS, INC., Defendants

CIVIL ACTION NO. 1: 00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

260 F. Supp. 2d 1334; 2003 U.S. Dist. LEXIS 5723

March 31, 2003, Filed

OINION BY: ORINDA D. EVANS

OPINION:

ORDER

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq., and 42 U.S.C. § 1981 is presently before the court on all Defendants' motion for summary judgment on the individual claims of Plaintiff Carolyn Wilson. For the reasons set forth below, Defendants' motion is GRANTED.

I. Facts

The following facts are undisputed unless indicated otherwise. Plaintiff was hired by Defendant Georgia Power Company ("GPC") in 1985. Third Am. Comp. at P 118. She held various positions within that organization through

approximately December 1997. *Id.* In late 1997, Plaintiff applied for a position with Defendant Southern Company Energy Solutions, Inc. ("SCES").[1] *Id.* at 121. SCES is

---

[1] Defendants The Southern Company ("TSC"] and Southern Company Services, Inc. ["SCS"] move for summary judgment on the grounds that Plaintiff has never been employed by nor did she ever apply for positions at TSC or SCS. Defendant GPC moves for summary judgment on the grounds that Plaintiff's employment with GPC ended prior to the relevant time period. Plaintiff has failed to respond to GPC's motion and is deemed to have abandoned her claim against GPC. *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

A plaintiff must be an "employee" to bring a Title VII lawsuit. *Llampallas v. Mini-Circuits. Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). An "employee" for Title VII purposes is *an* "individual[ ] who receives compensation from an employer." *Id.* at 1243. An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). The analysis of whether a party is an employer appears to be the same under Title VII and § 1981. *See Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (noting that these statutes have the same requirements of proof and use the same analytical framework); *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 61 n.2 (D.D.C. 1996); *Sargent v. McGrath*, 685 F. Supp. 1087, 1089 (E.D.Wis. 1988); *Alie v. NYNEX Corp.*, 158 F.R.D. 239, 245 n.3 (E.D.N.Y. 1994). Thus, Plaintiff has standing to sue TSC and SCS only if it can be shown that TSC and SCS constituted "employers" from whom Plaintiff received compensation.

It is undisputed that TSC is a holding company which owns the stock of all other Defendants named in the complaint but has no employees. Womack Aff. P 9. Plaintiff asserts that Defendants, including TSC, created SCS as a company-wide human resources department and use SCS's involvement in personnel policy-making and employee selection processes to maintain "substantial involvement" in SCES's personnel decisions. Pla. Resp. to Def. Hot. for S. J. at 34. Plaintiff alleges that Defendants have submitted the declarations of SCS employees who claim involvement in the selection processes at issue in this case. However, with respect to the evidence offered in support of Defendants' motion for summary judgment, only declarant Anthony Roberts is an SCS employee and his testimony is completely unrelated to any employment decision affecting Plaintiff.

(Continued on following page)

non-utility subsidiary of TSC which develops and sells unregulated, competitive energy-related products and services.

In July 2000, SCES had operations in Georgia, Alabama, Florida and Mississippi. During this time, SCES had six separate business units: Energy Services, the Finance Center, Good Cents, PowerCall Security, Premier Home, and Technical Consulting Services. According to Defendants, each of the SCES units performs very different functions. For example, the Energy Services unit assists large commercial, federal, and industrial customers with reducing energy costs and solving power quality problems. The PowerCall Security unit is responsible for selling and monitoring residential and commercial security and fire alarm systems. The Premier Home unit offers cable television, internet access, long distance telephone, electric and water sub-metering and billing services for multi-family sites. The Finance Center unit is or was responsible for handling transactions such as loan originations and consumer loan sales for commercial customers and employees.

The position for which Plaintiff applied in late 1997 was within SCES's Finance Center unit. The job posting for this position noted that it would be filled within a pay grade range of exempt two through exempt five; according to Defendants, the pay grade depended on the incumbent's experience and education. Karla Fuller, the hiring manager,

---

Plaintiff has failed to point to facts sufficient to support her argument that TSC or SCS is liable for any discriminatory acts. *See Wood v. Southern Bell Telephone and Telegraph Co.*, 725 F. Supp. 1244, 1249-50 (N.D.Ga. 1989). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to TSC, SCS and GPC.

was involved in writing the job description for the position and deciding on the possible pay grade range to be listed on the job posting. Defendants contend that Fuller did not assign a job title to the position within SHIPS, Defendants' employee database, but left the assignment of the SHIPS job title to the Human Resources Department. According to Fuller, the descriptive job title for the position was Finance Center Supervisor.

In December 1997, Plaintiff was offered and accepted this position. The offer letter stated that the position was being filled was "Project Analyst Senior"[2] at exempt level two. While she accepted the job in late December 1997, Plaintiff did not begin working at SCES in the Finance Center until February 1998. In her position in the Finance Center, Plaintiff reported to the Finance Center Manager and initially was responsible for handling the origination of consumer loans for commercial customers, establishing employee loans, entering those loan records in the company's personnel database and coaching and training Finance Center staff. Later, as the Finance Center changed and evolved, Plaintiff's duties also changed. For example, when the Finance Center stopped originating loans, Plaintiff became responsible for facilitating the bad debt reported by SCES's loan purchaser, Fannie Mae. Plaintiff admits that her position within SCES is unique and that she is not aware of anyone else who performs a job similar to hers.

Although the letter Plaintiff received at the time she accepted the position indicated that the position's title was

---

[2] Apparently, this is the SHIPS job title which corresponds to the descriptive title Finance Center Supervisor.

Project Analyst Senior, the SHIPS database actually listed the Finance Center Supervisor position as Project Analyst III. Pla. Dep. II at 48. Plaintiff discovered this discrepancy sometime in 2000. *Id.* plaintiff acknowledges that after she learned the company's SHIPS database listed her as a Project Analyst III, her job responsibilities did not change and she continued to sign letters using her functional job title of Finance Center Supervisor.

In February 1998, when Plaintiff began her position as Finance Center Supervisor, she earned a monthly salary of $ 2,692, or $ 32,304 annually. In November 1998, Plaintiff received a 15.45% increase to $ 3,108 per month, or $ 37,296 annually. Five months later, in March 1999, Plaintiff received a 4% increase to $ 3,232 per month, or $ 38,784 annually. At that time, Plaintiff also received a $ 7,460 incentive award, which was a figure equal to 20% of her salary, and a "spot award" in December of $ 4,241.51. In February 2000, Plaintiff entered into an incentive agreement with SCES in which Plaintiff had an opportunity to receive sizable additional bonuses. In March 2000, Plaintiff received a 4% increase in salary to $ 3,361 per month, or $ 40,332 annually. At that time, Plaintiff also received a $ 7,758 incentive award, which was a figure equal to 20% of her salary.

Defendants contend that in order to set compensation ranges for its various employee positions, SCES typically conducts market tests of the positions to compare salary rates to those of other similar companies in similar industries. At SCES, the job title "Project Analyst" is a broad classification that encompasses numerous job descriptions. Thus, Defendants contend, in order to set specific compensation rates for a position, the actual job duties must be examined. According to Defendants, no action was taken

at the time Plaintiff moved into the Finance Center to compare her compensation with anyone else in SCES because the Finance Center Supervisor position was not like any other position that existed anywhere else in the Company.

In November of 1999, Plaintiff applied for a Business Analyst II position with SCES. Karla Fuller was the hiring manager for this position and the successful candidate was to report to Fuller. This position involved managing working capital requirements of the Energy Services unit, monitoring working capital forecasts, assisting project managers with progress payment requests, account reconciliation, monitoring of invoicing of customers, and managing accounts receivable. According to Defendants, the preferred qualifications for the position were a bachelors degree in finance, management, or accounting; experience with the Excel spreadsheet program; experience in the construction industry; and good oral and written communication skills. Even though Plaintiff did not possess all of these qualifications, Fuller selected Plaintiff for an interview because Fuller was familiar with Plaintiff's job skills and experience. Defendants contend that Fuller wanted to hire an individual who could move into the position with little or no training.

Fuller evaluated Plaintiff as performing well during the interview. Fuller believed that another candidate, Sarah McFall, also performed well during the interview. The position was awarded to McFall. Defendants contend that McFall was awarded the position because, unlike Plaintiff, McFall had a bachelor's degree in accounting, had relevant specialized experience in construction accounting, and because Fuller believed that McFall was

better prepared to move into the position with little or no training or supervision.

This lawsuit was filed on July 27, 2000. In the complaint, Plaintiff alleges that Defendants discriminated against her by subjecting her to a hostile work environment, improperly denying her promotions, paying her less than her white co-workers, failing to perform performance evaluations for Plaintiff, demoting Plaintiff, and by employing promotion and compensation policies which had a discriminatory impact on black employees.

II. Defendants' Motion for Summary Judgment

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [defendant] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To prevail in its motion for summary judgment, Defendants must show that the evidence is insufficient to establish an essential element of Plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In ruling on Defendants' motion, the Court must view the evidence in a light most favorable to Plaintiff. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). If Defendants make a sufficient showing, then Plaintiff "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting Fed.R.Civ.P. 56(e)).

Under Title VII, an employer may be found liable for unlawful discrimination under any one of three discrete theories: disparate treatment discrimination, pattern and practice discrimination, or disparate impact discrimination. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1273 (11th Cir. 2000)[3] The first two theories require proof of discriminatory intent, while the third does not. *Id.* at 1273. Defendants argue that summary judgment is appropriate here because Plaintiff has failed to establish a claim of intentional discrimination or disparate impact. Plaintiff objects, arguing that there are genuine issues of material fact precluding summary judgment as to both Plaintiff's intentional discrimination and disparate impact claims.

A. Intentional Discrimination

To establish a prima facie case of race discrimination under a disparate treatment theory, Plaintiff may offer either direct or circumstantial evidence of discriminatory intent. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Alexander v. Fulton County. Ga.*, 207 F.3d 1303 (11th Cir. 2000). If the plaintiff presents direct evidence of discrimination, the defendant is then required to prove by a preponderance of the evidence that it would have taken the adverse employment action even in the absence of discrimination.

---

[3] Section 1981 provides a cause of action only for claims of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976); *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999).

If the plaintiff provides sufficient circumstantial evidence to support a prima facie case, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802-03. The defendant's burden is "exceedingly light" and is "one of production, not proof." *Id.* at 802. If the defendant satisfies its burden, the presumption of discrimination is eliminated and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. *Id.*

A plaintiff may also use statistical evidence to establish either a prima facie case of discrimination or pretext. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 952 (11th Cir. 1991). Statistics may be used to establish an individual plaintiff's claim that a pattern or practice of discrimination existed, or simply to bolster the plaintiff's circumstantial evidence of individual disparate treatment. Under the pattern and practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). Even if the statistical evidence is insufficient to meet this standard, evidence establishing a discriminatory pattern "is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue." *Parker v. Burnley*, 693 F. Supp. 1138, 1153 (N.D.Ga. 1988) (internal quotation marks and citation omitted). Whether the plaintiff argues that the statistical evidence supports a pattern or practice

claim or simply constitutes evidence of disparate treatment, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown*, 939 F.2d at 952 (citing *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987)).

1. Individual Disparate Treatment

Hostile Work Environment

In the complaint, Plaintiff alleges her supervisor made racist comments. *See* Third Am. Comp. P 119. In their motion for summary judgment, Defendants argue that Plaintiff cannot make a prima facie case of hostile work environment because she cannot show that the alleged conduct occurred during the relevant period. Plaintiff does not respond to this argument and thus is deemed to have abandoned this claim. *See Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

Promotion Discrimination

To establish a prima facie case for alleged failure to receive a promotion, Plaintiff must demonstrate that 1) she was a member of a protected class; 2) she applied and was generally qualified for the up-grade; 3) she did not receive the promotion; and 4) a similarly situated white employee received promotion over Plaintiff. *See, e.g., Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001). In the complaint, Plaintiff alleges that she was discriminated against with respect to two positions: Project Manager, for which she applied in 1997, and

Business Analyst, for which she applied in 1999. With respect to the 1997 Project Manager position, Defendants argue that Plaintiff's claim is untimely because the events associated with it fall outside the applicable statute of limitations. Plaintiff does not respond to this argument and therefore is deemed to have abandoned her claim with respect to this position.

With respect to the 1999 Business Analyst position, Defendants do not dispute that Plaintiff can establish a prima facie case but argue that Plaintiff cannot overcome Defendants' asserted non-discriminatory reason for the decision not to hire her for this position. Defendants contend that Plaintiff was not hired for this position because she did not possess all of the qualifications the hiring manager sought and that the successful candidate did possess these qualifications. Specifically, Defendants provided evidence that Karla Fuller, the hiring manager, sought an applicant with a bachelor's degree in finance, management, or accounting; Excel experience; construction industry experience; and good oral and written communication skills. Fuller Dec. P 4; Fuller Dep. at 114, 119, 121-22. Defendants also contend that Plaintiff was not hired for this position because Fuller believed that the successful candidate was better prepared to move into the position without extensive supervision or training. Fuller Dec. P 7.; Fuller Dep. 119, 121-22. These reasons constitute a legitimate, non-discriminatory reason for the decision not to hire Plaintiff for the position. *See, e.g., Denney*, 247 F.3d at 1183 (that successful candidate possessed the qualities that decisionmaker considered dispositive in choosing among the pool of qualified applicants constituted legitimate non-discriminatory reason); *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254 (11th Cir.

2000) (that successful candidate was better qualified with respect to three of the four criteria listed in the position application constituted legitimate non-discriminatory reason).

Plaintiff first attempts to establish pretext with respect to Defendants' assertion that Plaintiff was not hired for the position because she did not possess as many of the preferred qualifications as the successful candidate. Specifically, Plaintiff argues that her lesser qualifications were not the real reason for the decision because the preferred qualifications are not relevant to the position in question. Plaintiff argues that the actual relevant qualification for the position is experience in performing the functions listed in the job posting and that she, rather than the successful candidate, has that experience. However, Defendants are entitled to determine which qualifications are most desirable in a candidate for a particular position and it is not the job of this *Court* to second-guess those business decisions. *Denney*, 247 F.3d at 1186 n.8. The preferred qualifications – a bachelor's degree in finance, management, or accounting; Excel experience; construction industry experience; and good oral and written communication skills – are directly relevant to the performance of the position at issue, which involved the management of cash flow for Defendants' growing construction company. *See* Fuller Dep. at 106-07. That Plaintiff has experience in relevant job functions does not establish that Defendants' desire to hire a candidate who possessed more of the qualifications they deemed relevant does not indicate a discriminatory intent and thus does not constitute evidence of pretext. *Denney*, 247 F.3d at 1185 (holding that plaintiffs failed to establish pretext where they completely failed to show discriminatory intent in the

selection of specific subjective criteria or in the choice to focus on those criteria).

Plaintiff also attempts to establish pretext with respect to Defendants' assertion that Fuller, the hiring manager, believed that the successful candidate was better prepared than Plaintiff to move into the position without extensive supervision or training. Specifically, Plaintiff argues that she had performed the job functions relevant to the position at issue for almost two years at the time the position was filled and that the successful candidate did not have comparable experience. Plaintiff points to evidence that Fuller believed that the successful candidate would need to learn more about the job, that the successful candidate's degree did not provide her with any information about the SCES programs which Plaintiff believed were necessary to the position, that the successful candidate had limited construction industry experience, and that Plaintiff had more experience with a specific software application. Plaintiff also points to evidence that she had a better interview than the successful candidate.

Again, however, this evidence is insufficient to establish that Defendants did not believe that the successful candidate could move into the position with less supervision than Plaintiff, and thus is insufficient to establish pretext. Fuller testified that McFall, the successful candidate, only needed to learn more about the specific mechanics of the unit's business and its unregulated aspects. Fuller Dep. at 119-20. While McFall's experience in the construction industry may have been limited, Plaintiff points to no evidence that she herself had any such experience. That Plaintiff may have performed better in the interview does not establish that Fuller could not have believed that McFall was actually more qualified, especially

because there is no evidence that interview performance was considered a significant measure of an applicant's need for supervision. Plaintiff's opinion that she would need less supervision because she had more experience with software programs and systems she considered important does not constitute evidence that Fuller did not believe McFall in fact would need less supervision than Plaintiff. In short, Plaintiff offers little evidence other than her own opinion that she would need less supervision or training than the successful.

The proper pretext analysis is whether Plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997) (internal quotation mark and citations omitted). Defendants are certainly familiar with their own labor needs and are entitled to determine whether certain qualifications make a candidate more suitable for a particular position. *Murphy v. Yellow Freight System. Inc.*, 832 F. Supp. 1543, 1548 (N.D.Ga. 1993) ("The use of subjective factors in making employment decisions cannot be sufficient to support a finding of discrimination."). Plaintiff contends that the subjective reasons asserted are not credible based on evidence in the record. However, while the evidence Plaintiff offers suggests that the successful candidate required some training in the position, Plaintiff has not come forward with any evidence to establish that the decision makers with respect to this position did not actually find that the successful candidate would require less supervision than Plaintiff. Further, even if Plaintiff could establish that her experience made

her more qualified, "in a failure to promote case, a plaintiff cannot prove pretext by simply showing that she was better qualified than the individual who received the position that she wanted. . . . Disparities in qualifications are not enough in and of themselves to demonstrate discriminatory intent unless those disparities are so apparent as virtually to jump off the page and slap you in the face." *Denney*, 247 F.3d at 1187 (internal quotation marks and citations omitted). In this case, it cannot be said that the juxtaposition of Plaintiff's experience in performing relevant job functions and the successful candidate's possession of the stated preferred qualifications for the positions meet that standard. Plaintiff's evidence is thus insufficient to permit a reasonable fact-finder to conclude that the reasons given by Defendants were a pretext for intentional discrimination.

Plaintiff has also provided statistical evidence of racial imbalances in Defendants' hiring and promotion practices as evidence of pretext. Specifically, Plaintiff has offered statistical reports to support her claim that Defendants' hiring and promotion practices had a discriminatory effect on black employees. Plaintiff argues that the reports of her expert, Dr. Madden, which find statistically significant disparities in the promotion of black employees relative to white employees, are evidence from which a reasonable fact finder could determine that intentional discrimination occurred. Defendants contend that Plaintiff's generalized statistics are insufficient to support Plaintiff's claims of intentional discrimination.

As the Supreme Court has noted, while statistical evidence may allow the District Court to "determine . . . that the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices . . .

such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." *McDonnell Douglas*, 411 U.S. at 805 n. 19 (internal quotation marks and citation omitted). In this case, Plaintiff's statistical evidence is insufficiently tailored to support her individual claims.

Plaintiff's statistics compare the promotion rate of employees within the same pay grade who perform similar job functions; however, these statistics generally fail to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to hiring decisions. Plaintiff does not provide statistics comparing employees with equivalent work experience in specific job categories or job progressions, or outcomes for those employees, both black and white, who had actually applied for posted positions challenged by Plaintiff. Plaintiff relies instead on a statistical analysis of a company-wide data pool and makes no attempt to narrow the data pool to the locations in which she worked or the positions which she challenges. As this Court noted in the order denying class certification, the probative value of Plaintiff's statistical evidence is therefore highly questionable, in significant part due to the treatment of factors such as experience, education and specific promotion processes. *Cooper v. Southern Company*, 205 F.R.D. 596, 613-14 (N.D.Ga. 2001).

The analytical deficiencies of Plaintiff's statistics diminish the probative value of this evidence such that it cannot by itself support a claim of disparate treatment.

See Brown v. American Honda Corp., 939 F.2d 946, 952 (11th Cir. 1991) (holding that summary judgment was appropriate where plaintiff's statistical evidence, which lacked specific analytical foundation and thus failed to show that employer maintained discriminatory intent, was insufficient to establish prima facie case or pretext); *Hawkins v. Ceco Corp.*, 883 F.2d 977, 985 (11th Cir. 1989) (holding that plaintiff's statistical evidence failed to establish prima facie case or pretext where evidence failed to make specific analytical comparisons); cf. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977)[4] (holding that plaintiff's evidence of statistical disparities in hiring, promotion and compensation was sufficient to support claim of intentional discrimination where the employment decisions were based on completely subjective criteria).

Because Plaintiff has failed to establish pretext with respect to all of Defendants' asserted reasons, Defendants are entitled to summary judgment with respect to this position. *See Chapman v. AI Transport*, 229 F.3d 1012 (11th Cir. 2000); *Combs*, 106 F.3d at 1529.

In the motion for summary judgment, Defendants argue that Plaintiff cannot establish a prima facie case of promotion discrimination with respect to two positions which were not specifically raised in the complaint but which Plaintiff mentioned during discovery: a Support Representative Marketing position in November 1998 and a Customer Service Section Supervisor in 1999. Plaintiff

---

[4] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

does not respond to these arguments and thus is deemed to have abandoned any claims with respect to these positions.

Accordingly, Defendants are entitled to summary judgment with respect to Plaintiff's promotion discrimination claims.

Compensation Discrimination

Defendants first argue that this claim is barred by the statute of limitations because Plaintiff became aware of the allegedly discriminatory acts outside the statutory period. "Claims of discrimination accrue when the plaintiff is informed of the discriminatory act." *Everett v. Cobb County Sch. Dist.*, 138 F.3d 1407, 1410 (11th Cir. 1998). Defendants contend that Plaintiff should have filed her claim by February 2000, based on Plaintiff's testimony that she first began to believe that she was discriminated against with respect to pay during February 1998. Pla. Dep. II at 188. In response, Plaintiff contends that her claim is not barred because compensation discrimination constitutes a continuing violation bringing her claim within the statute of limitations. The Court of Appeals for the Eleventh Circuit has held that "race based, discriminatory wage payments constitute a continuing violation of Title VII." *Calloway v. Partners Nat. Health Plans*, 986 F.2d 446, 449 (11th Cir. 1993); *see also Bazemore v. Friday*, 478 U.S. 385, 395, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986). Because Plaintiff remains employed by Defendants and apparently contends that the alleged compensation discrimination continues, her claim is timely.

To make out a prima facie case of compensation discrimination, Plaintiff must establish the following four

elements: 1) that she is a member of a protected class; 2) that she received low wages; 3) that similarly situated persons outside the protected class received higher wages; and 4) that she was qualified to receive the higher wages. *MacPherson v. University of Montevallo*, 922 F.2d 766, 774 (11th Cir. 1991) (applying the test in an age discrimination case).[6] Defendants do not dispute that Plaintiff is a member of a protected class or that she received lower wages than her alleged comparators but argue that they are entitled to summary judgment on this claim because Plaintiff has failed to establish that she was similarly situated to any of her white co-workers who received higher pay.

---

[6] Plaintiff contends that to establish a prima facie case of compensation discrimination, she is only required to show that she was treated unfairly with respect to compensation and that Defendants operated with an improper intent. Plaintiff relies on the holding in *County of Washington v. Gunther*, 452 U.S. 161, 68 L. Ed. 2d 751, 101 S. Ct. 2242 (1981) to support her proposition that "claims for . . . wage discrimination can be brought under Title VII even though no member of the [non-protected group) holds an equal but higher paying job." Pla. Resp. To Def. Hot. S.J. at 2 (citing *Gunther*, 452 U.S. at 168). In *Gunther*, the Supreme Court determined that a female plaintiff was not required to meet the equal work standard to bring a sex discrimination claim under Title VII. The Court expressly noted that the issue before it was not whether the plaintiff could state a prima facie case under Title VII without such evidence. *Gunther*, 452 U.S. at 168 n.8. Plaintiff also cites *E.E.O.C. v. Reichhold Chems., Inc.*, 988 F.2d 1564, 1570 (11th Cir. 1993), in which the Eleventh Circuit acknowledged the Supreme Court's holding in *Gunther* that "a Title VII plaintiff could prevail if she could prove unfair treatment and an intent to discriminate." *Id.* However, the Eleventh Circuit did not find that the holding eliminated the requirement that Plaintiff show that she was paid less than a co-worker who was similarly situated but only that Title VII affords a less stringent standard as to similarity than the Equal Pay Act. *Id.* In any case, as discussed below, Plaintiff has failed to show that she was treated unfairly or that Defendants set Plaintiff's compensation with an improper intent.

In the complaint, Plaintiff asserts that her base salary was lower than three white employees holding the same "Project Analyst" title as Plaintiff – Dena Faessel, Kathy Robb, and Jimmy Allen – and three white employees holding titles lower than Plaintiff's – Marianne Mitchell Ellis, Reba Jones, and Barbara Stokes. Defendants contend that Plaintiff cannot establish a prima facie case because she cannot establish that she performs functions similar to her alleged comparators and thus cannot establish that she was similarly situated. "In a comparator analysis, the plaintiff is matched with a person or persons who have very similar job-related characteristics and who are in a similar situation to determine if the plaintiff has been treated differently than others who are similar to him." *Id.*

As Finance Center Supervisor, Plaintiff has been responsible for assisting with the handling of loan originations and loan sales, establishing employee loans, recording employee loans on the SHIPS database, and coaching and training Finance Center staff and interns. Plaintiff is also responsible for facilitating the bad debt reported by SCES's loan purchaser, Fannie Mae. As noted above, Plaintiff admits that her position within SCES is unique and that she is not aware of anyone else who performs a job similar to hers.

Plaintiff alleges that Dena Faessel, who is white, was a Project Analyst Senior that, at $ 65,000 per year, was paid more than Plaintiff while holding the same job title as Plaintiff during the period in question. However, Faessel worked in the PowerCall Security unit in Pensacola, Florida. When she held the SHIPS job title of Project Analyst Senior, Faessel was responsible for performing auditing and due diligence analyses of companies which

Powercall was interested in acquiring and working with those newly-acquired companies to commence business operations. Faessel's functional job title was Project Manager or Project Executive. Faessel holds an associate's degree in business administration, a bachelor's degree in finance, and a master of business administration degree.

Plaintiff also alleges that Kathy Robb, who is white, was a Project Analyst Senior that, at $ 54,000 per year, was paid more than Plaintiff while holding the same job title as Plaintiff. However, Robb works in the Energy Services unit in Atlanta, Georgia. While she held the SHIPS job title of Project Analyst Senior, Robb was responsible for sales and marketing management for SCES's commercial lighting retrofit business. In this position Robb conducted oversight of SCES's contractual obligation to retrofit every Tyson poultry processing plant, hatchery, and feed mill in order to help Tyson comply with specific EPA requirements. Her duties included surveying each facility, performing an analysis of lighting savings and pricing installation of lighting equipment for each facility, and managing audits. Robb oversaw a staff of auditors to manage retrof its at Tyson facilities nationwide. Robb also prepared proposals for retrof its and presented those proposals to SCES and Tyson senior management, worked closely with Tyson's energy director, negotiated new contracts with electrical contractors, explained new energy savings technologies, and maintained a strong working relationship with Tyson. Robb's functional title was Team Leader for SCES's Lighting Retrofit Department.

Jimmy Allen works for SCES as a Project Manager. From April 1998 through November 1999, Allen held the SHIPS database title of Project Analyst Senior. During that time, Allen was responsible for overseeing commercial

construction projects, including contract negotiation and on-site construction management, managing day-to-day activities for large commercial construction projects for SCES's customers, ranging from smaller lighting installation projects to the construction of major chiller plants, negotiating contracts with customers and contractors, working with customers and contractors to develop and implement construction plans, managing business and construction problems as they occurred, and handling customer complaints. Allen typically worked on construction sites rather than in an office environment. Allen's functional job title during that time was Project Superintendent.

Nor are the three white co-workers with lower titles than Plaintiff's similarly situated to Plaintiff. Marianne Ellis worked for the PowerCall unit in Atlanta. Roberts Dec. P 6. Ellis initially served as Executive Secretary to David Sherrill, General Manager within SCES in Atlanta, then to Anthony Roberts, PowerCall's Operations Manager from 1998 to 2000. *Id.* Ellis was responsible for performing various secretarial duties, as well as managing her supervisor's appointments. *Id.*

Barbara Stokes worked as a Project Specialist in the PowerCall business unit in Atlanta. *Id.* at P 5. In this capacity, Stokes was responsible for supporting PowerCall customer service operations, entering customer orders, managing customer accounts, and managing billings for PowerCall's residential and commercial security system customers. *Id.*[6]

---

[6] Plaintiff also asserted in her complaint that she was improperly paid less than Reba Jones. Defendants contend that Plaintiff cannot

(Continued on following page)

Plaintiff does not attempt to show that she performed the same functions or even the same type of work as these alleged comparators. Instead, Plaintiff argues that Defendants cannot rely on differences in job function to justify any pay disparity because Defendants allegedly use job title, rather than function, as an internal measure of pay equity. This argument goes to whether Defendants have a legitimate non-discriminatory reason for pay disparity and does not cure Plaintiff's failure to show that she performed the same type of functions as these alleged comparators. Because Plaintiff fails to show that she was similarly situated to these alleged comparators, she cannot show that she was treated unfairly with respect to compensation.

Nor can Plaintiff establish that Defendants were motivated by a discriminatory intent when they made decisions with respect to Plaintiff's compensation. Fuller testified that to determine Plaintiff's compensation for the Project Analyst position, she had to determine Plaintiff's then-current salary and could then increase that figure by either 6 or 8%, because this was the procedure for setting compensation when filling a position internally. Fuller Dep. at 36, 61-62. Plaintiff attempts to establish discriminatory intent by contradicting the evidence that Fuller believed that a 6 to 8% increase was appropriate in setting compensation for an internal hire. Specifically, Plaintiff points to evidence that another SCES employee received a

---

establish that Jones performed functions similar to Plaintiff's and thus cannot establish a prima facie case but fail to point to any evidence in the record to support this position. However, Plaintiff does not respond to this argument and thus is deemed to have abandoned her claim with respect to this comparator.

12% increase in salary after he was promoted just three months after Plaintiff. However, Plaintiff does not contend that Fuller set the compensation for the other employee. Plaintiff also points to the testimony of Steven Wilkinson, a human resources representative, that a manager has discretion to raise a promoted employee's salary more than 8% when the 8% increase would be insufficient to egualize [sic] the promoted employee's compensation with that of similarly situated employees. That Fuller had the discretion to increase Plaintiff's salary more than 8% to equalize her pay with respect to similarly situated co-workers but did not might constitute evidence of discriminatory intent. However, as discussed above, Plaintiff has failed to establish that she was paid less than similarly situated employees and thus cannot show that Fuller had the discretion to increase Plaintiff's salary more than 8% but chose not to.

Plaintiff also contends that she can demonstrate discriminatory intent with evidence that other black employees in her department received compensation below the minimum of their pay grade level. This evidence is insufficient to establish discriminatory intent. Plaintiff points to no evidence with respect to the overall compensation levels within the department or evidence with respect to the employment history of these other employees. That some black employees within Plaintiff's department received low compensation does not, on its face, constitute evidence of a pattern of discrimination and is not evidence that Defendants operated with a discriminatory intent in setting Plaintiff's compensation.

Plaintiff also argues in her response to Defendants' motion for summary judgment that she can establish a prima facie case of compensation discrimination by showing that she was paid less than white employees who

possessed the same level of education and experience and who performed the same job function as Plaintiff. In support of this contention, Plaintiff points to her own affidavit, in which she apparently describes her job functions, and to the reports of Plaintiff's expert, Dr. Janice Madden. However, Plaintiff did not include her affidavit in the Appendix to Plaintiff's Response to Defendants' Motion for Summary Judgment. With respect to Dr. Madden's reports, Plaintiff contends that these reports support her contention that she was paid less than white employees who possessed the same level of education and experience and who performed the same job function as Plaintiff.

Plaintiff specifically relies on Dr. Madden's findings in her third report, attached to Plaintiff's Appendix to Plaintiff's Response to Defendants' Motion for Summary Judgment as Exhibit 18. Plaintiff contends that Dr. Madden's estimation that "Caucasians with the same education, experience and job function" as Plaintiff earned more than similarly situated black employees, including Plaintiff, constitutes evidence that Plaintiff was paid less than white co-workers performing the same job functions as Plaintiff. However, Dr. Madden's report contains no specific information, much less evidence, with respect to identity of these alleged comparators or their job functions. Indeed, Dr. Madden states that she developed her estimate "using the earnings of promoted employees identified by counsel as comparable to the plaintiff[]." App. to Pla. Resp. to Def. Mot. S.J., Ex. 18 at 2. There is no specific detail in the exhibit with respect to the information counsel provided to Dr. Madden, making it impossible to determine whether the estimate Dr. Madden developed

is an accurate proxy for evidence that a proper comparator was paid more than Plaintiff.

Plaintiff also suggests that Dr. Madden's earlier reports, offered in support of the motion for class certification, provide evidence of a pattern and practice of discrimination which is sufficient to state a prima face case of compensation discrimination. However, for the reasons stated below, these reports are insufficient to establish a pattern and practice claim and further lack any detail with respect to Plaintiff's specific compensation claims and thus do not support Plaintiff's attempt to establish a prima facie case.

Plaintiff also alleged in the complaint that she was discriminated against with respect to compensation when she failed to receive a second $ 5,000 pay increase in March 1999, which she alleges Defendants promised to her. Defendants argue that Plaintiff cannot establish a prima facie case with respect to this claim because she has not put forward any evidence that she failed to receive the second pay increase because she is black. Plaintiff did not respond to this argument and thus is deemed to have abandoned this claim.

Because Plaintiff has failed to provide sufficient evidence to establish a prima facie of compensation discrimination, Defendants' motion for summary judgment is GRANTED with respect to this claim.

SHIPS Coding Mistake

In the complaint, Plaintiff alleges that she was discriminated against when Defendants offered her a Project Analyst Senior position but coded Plaintiff's position as

Project Analyst III within Defendants' SHIPS database and then corrected her job title in March 2000 to bring her title into conformance with the coding. Defendants argue that Plaintiff cannot establish a prima facie case because the title change does not constitute an adverse employment action and because Plaintiff cannot show that a similarly situated white employee was treated more favorably than she was. However, Plaintiff fails to respond to these arguments and thus is deemed to have abandoned this claim.

Performance Evaluations

Similarly, Plaintiff alleged in the complaint that she was discriminated against when she failed to receive performance evaluations after 1997. Defendants contend that Plaintiff cannot establish a prima facie case because she admits that she received performance evaluations after 1997. Defendants further contend that Plaintiff cannot establish a prima facie case that she received discriminatorily Low evaluations because a low evaluation does not constitute an adverse employment action. Plaintiff fails to respond to either of these arguments and thus is deemed to have abandoned this claim.

2. Pattern and Practice

Plaintiff has failed to create a genuine issue of material fact as to whether a pattern or practice of discrimination existed. Plaintiff has offered only statistical evidence to support her pattern or practice claim. Under the pattern or practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's*

Stone Crab, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). While "statistics as to [Defendants'] employment policy and practice may be helpful to a determination of whether [Defendants'] refusal to [ ]hire [Plaintiff] in this case conformed to a general pattern of discrimination against blacks," *McDonnell Douglas*, 411 U.S. at 805, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (2.989); In re: *Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1312 (11th Cir. 1999). The analytical deficiencies of Plaintiff's statistical evidence, discussed above, render this evidence insufficient to support a pattern or practice claim.

In addition to Plaintiff's expert reports, Plaintiff offers Defendants' internal personnel documents to support her argument that Defendants maintained a pattern or practice of compensation discrimination. While these documents indicate some disparity in compensation between black and white employees, these documents are not probative as to whether Defendants intentionally discriminated against Plaintiff during the period in question. The documents indicate average salaries of employees divided by racial classification but do not control for factors such as education, experience or skill level and thus cannot prove that Defendants discriminated on the basis of race. Plaintiff has thus failed to come forward with evidence sufficient to prove that intentional discrimination was Defendants' "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75 Accordingly, Defendants' motion for summary judgment with

respect to Plaintiff's pattern and practice claim is GRANTED.

B. Disparate Impact

Finally, Defendants argue that Plaintiff has failed to establish a claim of disparate impact under Title VII. To establish a claim under a theory of disparate impact, Plaintiff must show 1) the existence of a statistically significant disparity among members of different groups affected by employment decisions; 2) the existence of a specific, facially neutral employment practice; and 3) the existence of a causal nexus between the specific[1] [sic] facially neutral employment practice and the statistically significant disparity. 42 U.S.C. § 2000e-2(k); *Joe's Stone Crab*, 220 F.3d at 1274; *Crum v. Alabama (In re Employment Discrimination Litig.)*, 198 F.3d at 1311-14. Defendants contend that Plaintiff's statistics, which are not adjusted to account for differences among various positions and the respective skill and education levels required, are insufficient to establish a statistically significant disparity required to state a claim. Plaintiff argues in response that her statistical evidence is sufficient to create a genuine issue of material fact precluding summary judgment.

As evidence of a facially neutral policy, Plaintiff points to Defendants' use of subjective criteria in determining which applicants to interview and thus which applicants to hire. While Plaintiff has failed to identify in her response to Defendants' motion for summary judgment a specific policy which has had an impermissibly discriminatory impact on her, Plaintiff provided evidence in his motion for class certification to support his claim that

Defendants allowed the use of subjective criteria by decisionmakers in each of its subsidiaries.

However, showing that Plaintiff was subject to subjective policies does establish a prima facie case of disparate impact. Plaintiff must also show the existence of a causal nexus between these specific, facially neutral employment practices and a statistically significant disparity. "'[P]laintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'" *Joe's Stone Crab*, 220 F.3d at 1275 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988)). In this case, Plaintiff has failed to establish that the use of subjective hiring criteria caused a statistical disparity within the promotions for which she applied.

To establish the first element of a disparate impact claim, Plaintiff relies on her expert's report which finds statistically significant disparities in the promotion of black employees relative to white employees. As Defendants note, however, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); In re: *Alabama*, 198 F.3d at 1312. Plaintiff's expert reports an over-all statistical disparity between black and white employees in hiring and promotion by Defendants. However, Plaintiff's statistics – which compare promotions among employees within the same pay grade who perform similar job functions – fail to distinguish between positions in which Defendants' decisionmakers applied the express objective hiring factors

and those in which the decisionmakers employed subjective criteria. Further, Plaintiff's evidence generally fails to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to promotions. Plaintiff's evidence also fails to compare outcomes for those employees who actually applied for posted positions. Nor does Plaintiff's evidence distinguish between competitive and non-competitive promotions; such deficiency further undermines the probative value of Plaintiff's statistics. *See Forehand v. Florida State Hospital at Chattahoochee*, 89 F.3d 1562, 1572-73 (11th Cir. 1996).

Because of these deficiencies, Plaintiff cannot establish the existence of a causal nexus between a specific, facially neutral employment practice and a statistically significant disparity. *See, e.g., Joe's Stone Crab*, 220 F.3d at 1279. In Joe's Stone Crab the Eleventh Circuit found that the EEOC failed to establish a disparate impact claim where the EEOC presented no evidence that the employer's use of subjective criteria caused minority applicants not to apply or that minority applicants for positions at issue were disadvantaqed by the subjective criteria. Similarly, in this case Plaintiff fails to point to any evidence linking Defendants' use of subjective criteria to the alleged statistical disparity. Therefore, Defendants' motion for summary judgment with respect to Plaintiff's disparate impact claim is granted. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir. 1993) (holding that employer is entitled to summary judgment where plaintiff fails to provide evidence necessary to prove at trial that there is

disproportionate impact of employer's policy on black employees).

For the reasons stated above, Defendants' motion for summary judgment is GRANTED.

SO ORDERED, this 31 day of March, 2003.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, AND CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., AND SOUTHERN COMPANY ENERGY SOLUTIONS, INC., Defendants

CIVIL ACTION NO. 1:00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

260 F. Supp. 2d 1352; 2003 U.S. Dist. LEXIS 5722

March 31, 2003, Decided
March 31, 2003, Filed

OPINION BY: ORINDA D. EVANS

OPINION:

ORDER

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 is presently before the Court on all Defendants' motion for summary judgment on the individual claims of Plaintiff Cornelius Cooper. For the reasons set forth below, Defendants' motion is GRANTED.

I. Facts

The following facts are undisputed except as indicated otherwise. Plaintiff has worked exclusively for Defendant

Georgia Power Company ["GPC"] since 1973.[1] Since approximately October 1996, Plaintiff has been assigned to work on a two-man team as a lineman performing

---

[1] Defendants The Southern Company ["TSC"], Southern Company Energy Solutions, Inc. ["SCES"], and Southern Company Services ["SCS"] move for summary judgment on the grounds that Plaintiff has never been employed by nor did he ever apply for positions at TSC, SCES, or SCS. Plaintiff has failed to respond to SCES's motion and is deemed to have abandoned his claim against SCES. *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

A plaintiff must be an "employee" to bring a Title VII lawsuit. *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1242 (11th cir. 1998). An "employee" for Title VII purposes is an "individual[] who receive(s) compensation from an employer." *Id.* at 1243. An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). The analysis of whether a party is an employer appears to be the same under Title VII and § 1981. *See Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (noting that these statutes have the same requirements of proof and use the same analytical framework); *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 61 n.2 (D.D.C. 1996); *Sargent v. McGrath*, 685 F. Supp. 1087, 1089 (E.D.Wis. 1988); *Alie v. NYNEX Corp.*, 158 F.R.D. 239, 245 n.3 (E.D.N.Y. 1994). Thus, Plaintiff has standing to sue TSC only if it can be *shown* that TSC constituted an "employer" from whom Plaintiff received compensation.

It is undisputed that TSC is a holding company which owns the stock of all other Defendants named in the complaint but has no employees. Womack Aff. P 9. Plaintiff asserts that Defendants, including TSC, created SCS as a company-wide human resources department and use SCS's "extensive involvement in personnel policy-making and employee selection processes" to maintain "substantial involvement in GPC's personnel decisions." Plaintiff fails to point to any facts in the record to support these allegations; however, even if this were true, it is irrelevant with respect to Plaintiff's claims. Plaintiff has failed to provide evidence that any SCS employees were involved in any allegedly discriminatory acts. *See Wood v. Southern Bell Telephone and Telegraph Co.*, 725 F. Supp. 1244, 1249-50 (N.D.Ga. 1989). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to TSC, SCES and SCS.

underground streetlight cable repairs. Since approximately October 1996, Plaintiff has not worked on a line crew nor worked on overhead lines as part of his regular job responsibilities.

In July 1998, GPC's Lighting Services Business Unit ("LSBU") posted openings for two Lighting Coordinator positions on JobNet, Defendants' internal job posting program. Lighting Coordinators are responsible for supervising and overseeing the installation of outdoor lighting systems performed by teams of independent contractors. Lighting Coordinator duties include managing sales orders for installations of new outdoor lighting units through completion of an installation project, checking the construction specifications and materials list for an installation project, scheduling installation project work, managing and overseeing the work performed by contractor crews, resolving problems that arise on the site, and reviewing the bills submitted from the contractors.

LSBU Sales Manager Mike Clay was the hiring manager responsible for selecting individuals to interview from among the applicants for the July 1998 Lighting Coordinator openings, as well as deciding which individuals would be offered the two positions. There were over fifty applicants, including Plaintiff, who applied for the two positions. Plaintiff was not among those selected to interview for the Lighting Coordinator positions.

Clay made the final decision on whom to offer the two Lighting Coordinator positions and selected Donald Callihan and Gene Edwards to fill the two Lighting Coordinator positions. Both Callihan and Edwards initially accepted Clay's offer to fill the Lighting Coordinator positions. Less than one week after he accepted the position, Callihan

changed his mind and turned the offer down, leaving one of the two positions open.

Between the time Callihan and Edwards were offered the Lighting Coordinator positions and when Callihan turned the offer down, a new Operations Manager, Ken Leonard, was hired to oversee the Lighting Coordinators in the LSBU. Leonard assumed the responsibility for filling the one open Lighting Coordinator position. To determine who would be interviewed for this position, Leonard reviewed the list of candidates whom Clay had initially selected for interviews and discussed these candidates with Clay. Out of the previous pool of nine interviewees, Leonard decided to interview Ronnie Turner and Glen Hicks. Leonard also decided to interview two candidates, Frank Gilliam and Duane Johnson, who had not previously applied or interviewed for the position but who subsequently personally expressed interest in the position to Leonard. Leonard did not consider Plaintiff for an interview because Leonard had decided not to interview any of the approximately forty-seven applicants who were not initially selected for an interview by Clay. Leonard decided to offer the position to Turner. Turner declined the Lighting Coordinator position when Leonard offered it to him, so Leonard next offered the position to Nicks [sic]. Hicks accepted the offer and became a Lighting Coordinator.

In August 1998, Training Manager F.R. Howard posted six openings for Power Delivery Specialists (now known as "Methods & Training Specialists" or "Trainers") at GPC's Training Center. Trainers provide hands-on training to line crew employees in current safety and job-related skills necessary for lineman work. Openings for Trainer positions usually attract a large number of qualified applicants, including crew leaders, foremen and

linemen. As the hiring manager for the six Trainer positions, Howard was responsible for selecting applicants to interview and deciding who to hire for these positions. Approximately eighty-seven individuals, including Plaintiff, applied for the six open positions. Howard selected fourteen applicants to interview for the six available positions. Plaintiff was not among the fourteen candidates Howard selected for an interview.

This action was filed on July 27, 2000. In the complaint, Plaintiff alleges that Defendants discriminated against him by subjecting him to a hostile work environment and by improperly denying Plaintiff promotions.

II. Defendants' Motion for Summary Judgment

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [Defendant] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To prevail in their motion for summary judgment, Defendants must show that the evidence is insufficient to establish an essential element of Plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In ruling on Defendants' motion, the Court must view the evidence in a light most favorable to Plaintiff. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). If Defendants make a sufficient showing, then Plaintiff "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574,

587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (*quoting* Fed.R.Civ.P. 56(e)).

As an initial matter, all of Plaintiff's Title VII claims must be dismissed as untimely. In order to assert a claim under Title VII, a plaintiff must file a charge of discrimination with the Equal Employment Opportunity Commission ["EEOC"]. 42 U.S.C. § 2000e-5(e)(1); *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 848 (11th Cir. 2000). Any claims under Title VII based on alleged events that occurred more than 180 days before the filing of an EEOC charge are barred by the applicable statute of limitations. 42 U.S.C. § 2000e-5(e)(1); *Stewart*, 232 F.3d at 848. Plaintiff did not file an EEOC charge himself but apparently intends to "piggy-back" on the EEOC charge filed on July 21, 2000, by co-plaintiff Michael Edwards. Because none of the acts about which Plaintiff complains occurred on or after January 24, 2000, Plaintiff fails to state a claim under Title VII.

Nor can Plaintiff state a claim under Section 1981 based on alleged events that occurred more than two years before the filing of this lawsuit, or before July 28, 1998. *Hill v. Metropolitan Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1546 (11th Cir. 1988) (recognizing two-year statute of limitations for section 1981 claims filed in federal court in Georgia). The only allegations Plaintiff now maintains which are timely under Section 1981 are (1) his claim that he was denied a promotion to a Lighting Coordinator position in July 1998 and (2) his claim that he was denied a promotion to a Trainer position in August 1998.

Section 1982 provides a cause of action only for claims of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976);

Ferrill v. Parker Group, Inc., 168 F.3d 468, 472 (11th Cir. 1999). Under Section 1981, an employer may be found liable for unlawful discrimination under either of two discrete theories: disparate treatment discrimination or pattern and practice discrimination. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1273 (11th Cir. 2000). Both theories require proof of discriminatory intent. *Id.* at 1273.

To establish a *prima facie* case of race discrimination under a disparate treatment theory, Plaintiff may offer either direct or circumstantial evidence of discriminatory intent. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Alexander v. Fulton County, Ga.*, 207 F.3d 1303 (11th Cir. 2000). If the plaintiff presents direct evidence of discrimination, the defendant is then required to prove by a preponderance of the evidence that it would have taken the adverse employment action even in the absence of discrimination.

To make a *prima facie* case using circumstantial evidence, a plaintiff may use the test established in *McDonnell Douglas.*[2] A plaintiff may establish a *prima facie* case by demonstrating 1) that he belongs to a protected class; 2) that he was qualified for and applied for the job; 3) that he was rejected; and 4) that others who were not members of the protected class were promoted. *Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997).

---

[2] The *McDonnell Douglas* standard for a *prima facie* case is applicable in employment discrimination suits brought under 42 U.S.C. § 1981. *Sledge v. Goodyear Dunlop Tires North America, Ltd.*, 275 F.3d 1014 (11th Cir. 2001).

If the plaintiff provides sufficient circumstantial evidence to support a *prima facie* case, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802-03. The defendant's burden is "exceedingly light" and is "one of production, not proof." *McDonnell Douglas*, 411 U.S. at 802. If the defendant satisfies its burden, the presumption of discrimination is eliminated and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. *Id.*

A plaintiff may also use statistical evidence to establish either a *prima facie* case of discrimination or pretext. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 952 (11th Cir. 1991). Statistics may be used to establish an individual plaintiff's claim that a pattern or practice of discrimination existed, or simply to bolster the plaintiff's circumstantial evidence of individual disparate treatment. Under the pattern and practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). Even if the statistical evidence is insufficient to meet this standard, evidence establishing a discriminatory pattern "is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue." *Parker v. Burnley*, 693 F. Supp. 1138, 1153 (N.D.Ga. 1988) (internal quotation marks and citation omitted). Whether the plaintiff argues that the statistical evidence supports a pattern or practice

claim or simply constitutes evidence of disparate treatment, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown v. American Honda Motor Co.*, 939 F.2d 946, 952 (11th Cir. 1991) (*citing Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987)).

A. Disparate Treatment

1. Hostile Work Environment

In the complaint, Plaintiff alleges that Defendants discriminated against him when he was repeatedly subjected to offensive comments about his race. Third Amended Complaint P 72. Defendants contend that Plaintiff abandoned this claim prior to Defendants' motion for summary judgment. Plaintiff does not respond to this argument and thus is deemed to have abandoned this claim. Defendants are therefore entitled to summary judgment on this claim. *See Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

2. Promotion Discrimination

Plaintiff also alleges that Defendants discriminated against him by improperly denying him promotions. Plaintiff contends that Defendants discriminated against him when white applicants were promoted over Plaintiff to a Lighting Coordinator position in July 1998 and to a Trainer position in August 1998. Plaintiff further alleges that he has been treated differently than the following individuals because of his race: Rick Mondy, Leonard

Fletcher, Danny Sly, Davis Sutton, Darrell Wright, Bo Smith, and Joe Brown Lee.

Lighting Coordinator

Defendants do not dispute that Plaintiff can establish a *prima facie* case with respect to this position but argue that Plaintiff cannot overcome their asserted non-discriminatory reasons for the decision not to hire Plaintiff.[3] According to Defendants, after the application period closed, Clay received a computer-generated list of approximately 55 individuals who applied for the position through JobNet. Clay Dec. P 7. Clay also received a computer-generated candidate profile for each applicant that listed the applicant's employment history with Defendants and, if submitted by the applicant, a statement of why the applicant believed that he was qualified for the position. *Id.* Clay, with the assistance of LSBU Operations Manager Lisa Meyers, reviewed all of the applicants' qualifications listed on the candidate profiles in order to select qualified applicants to interview for the openings. Clay based the interview selections on criteria they determined were relevant for the job, including a minimum of two years experience in power delivery; demonstrated strength in communication, initiative, leadership, and teamwork skills; and preferred experience in contract administration and supervising contractors. In deciding whom to interview, Clay considered the qualifications described on the applicants' candidate profiles as well as any personal knowledge they possessed concerning applicants'

[3] Although Defendants state that Plaintiff "cannot" establish a *prima facie* case, *see* Def. Mot. S.J. at 19, they fail to make any argument to support this position.

qualifications and any recommendations for the applicants they had received from managers, supervisors, or other employees.

Nine applicants were selected to interview for the two open positions: Gene Edwards, Glen Hicks, Ronnie Turner, Anthony Paramore, Pete Camp, Harry Lindsey, Perry Craig, Jimmy Jones, and Donald Callihan. In making his interview decisions, Clay first ruled out any applicant whose candidate profile did not indicate that the applicant had power delivery experience. Clay Dec. P 10; Clay Dep. at 24, 103. Clay then selected all of the applicants who had served as a foreman because Clay believed that those individuals had demonstrated initiative, communication skills, and leadership skills and it was likely that these candidates had knowledge of contract administration and experience supervising contractors. Clay Dec. P 10. Other applicants were granted interviews if the applicant had power delivery experience and either (1) Clay or Meyers knew the applicant's qualifications personally, (2) Clay received a recommendation for the applicant, or (3) the applicant demonstrated initiative by expressing special interest in the position to Clay or other LSBU employees in gaining knowledge of the duties of the Lighting Coordinator position. Clay Dec. P 11; Clay Dep. at 25, 35-37, 45, 65, 74.

Clay contends that he did not select Plaintiff for an interview because Clay did not glean from Plaintiff's application that Plaintiff had initiative, communication skills, leadership skills, knowledge of contract administration, or experience supervising contractors. To the best of Clay's knowledge, Plaintiff had never worked as a foreman, had not demonstrated any initiative or special interest in the position by seeking out Clay or other

members of the LSBU, nor had Clay received any recommendations on Plaintiff's behalf. Clay Dec. P 16; Clay Dep. at 80.

After one of the successful candidates turned down the offer for the position, Leonard interviewed only those candidates who had either (a) applied for the position through JobNet and had been granted an interview by Clay, or (b) actively sought the position by seeking out Leonard to discuss the position. Leonard Dec. PP 4-5; Leonard Dep. at 18-20. According to Defendants, Leonard sought and received approval from the Human Resources department to consider Gilliam and Johnson for the vacant position. Plaintiff did not fall within either of these two categories and thus was not granted an interview. These reasons constitute legitimate, non-discriminatory reasons for the decision not to hire Plaintiff. *See, e.g., Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001) (that successful candidate possessed the qualities that decisionmaker considered dispositive in choosing among the pool of qualified applicants constituted legitimate non-discriminatory reason); *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254 (11th Cir. 2000) (that successful candidate was better qualified with respect to three of the four criteria listed in the position application constituted legitimate non-discriminatory reason).

In response, Plaintiff attempts to establish pretext by showing that the reasons cited by Defendants were not the actual reasons for the decision not to hire Plaintiff. *See Hill v. Seaboard Coast Line R. Co.*, 885 F.2d 804, 810-11 (11th Cir. 1989) (noting that plaintiff may show pretext either directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is

unworthy of credence). Defendants are certainly entitled to employ subjective criteria in making a hiring decision. *Murphy v. Yellow Freight System, Inc.*, 832 F. Supp. 1543, 1548 (N.D.Ga. 1993) ("The use of subjective factors in making employment decisions cannot be sufficient to support a finding of discrimination."). The proper pretext analysis is whether the plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997) (internal quotation marks and citations omitted).

First, Plaintiff points to Leonard's testimony that most of the criteria considered by Clay – initiative, communication skills, leadership skills, knowledge of contract administration, and experience supervising contractors – cannot be determined from a candidate profile and that it would be unfair to consider an applicant based solely on his profile if the hiring manager was looking for this criteria. Leonard Dep. at 38. However, that Leonard believes it would be unfair to rely solely on the candidate profile when employing the stated criteria does not render Clay's explanation unworthy of credence. Clay testified that he considered not only the candidate profiles, but also the resumes that some of the applicants submitted, the recommendations he received on behalf of applicants, and the initiative displayed by those applicants who contacted him or other LSBU employees directly to learn more about the position.

Plaintiff also contends that Clay's explanation is not credible because Clay testified that at the time he decided who to interview for this position, it was possible that he

did not know anything about the communication skills or the contract administration experience of some of the candidates. Clay Dep. at 33, 39, 52, 57-60. Plaintiff contends that this evidence establishes that Clay did not actually consider the stated criteria in deciding whom to interview or that he did not require the white applicants to meet those criteria. However, Clay's testimony that he may not have had information about the specific skills of some of the applicants he selected for interviews does not contradict Clay's explanation of the selection process. Clay testified that he relied on the recommendations received from other managers or LSBU employees to determine whether the applicants he did not know personally possessed strong initiative, communication, leadership, or teamwork skills. Clay Dec. P 11. Further, that Clay may not have had specific information about an applicant's skills in a particular area at the time he determined which applicants to interview does not establish that Clay did not actually consider those qualities. Rather, Clay testified that he considered certain qualifications, such as foreman experience, supervisor recommendations, and an applicant's initiative in contacting Clay, as proxies for some of the specific criteria he used to cull the applicant pool. *Id.* PP 10, 11, 13.

Plaintiff also attempts to establish that Clay's claim that he selected for interviews those employees for whom he received recommendations is pretext for discrimination. Specifically, Plaintiff points to evidence that there is no written record of any alleged recommendations, that Clay cannot recall the specific details of the recommendations, and that Defendants did not note these alleged recommendations in response to Plaintiff's interrogatories seeking all the reasons Defendants assert to explain why

Plaintiff was not awarded this position. None of these arguments create an issue as to pretext. Plaintiff argues that Clay violated Defendants' selection document processing policy by failing to retain records of the recommendations. However, to support this argument Plaintiff points only to a blank copy of the selection processing document and the applicable instructions, which require that the document be completed with basic information regarding the hiring process. *See* Pla. Resp. to Def. Mot. S.J., Exs. 33, 34. Plaintiff fails to point to any evidence with respect to the actual document reflecting the hiring process at issue or to any evidence that Clay was specifically required to maintain such records. That Clay could not recall during his deposition the specific details of the recommendations received almost four years earlier does not suggest pretext.

Plaintiff also contends that pretext is established by the fact that recommendations Clay received were not performance-based. Plaintiff apparently contends that Clay's claim that he relied on the recommendations in determining who to interview is not worthy of credence because the recommendations were not based on the applicants' performance. Clay Dep. at 27, 47-49, 50-51, 53-55, 65-66, 73. However, Plaintiff mischaracterizes Clay's testimony. The passages to which Plaintiff cites reflect that the recommendations Clay received were general statements regarding an applicant's suitability for the position. That Clay was unable to recall in his deposition the specific relationships between the applicants and the managers or co-workers who recommended them or the recommendations' details does not establish that the recommendations were not based on the applicants' performance. Plaintiff points to no affirmative evidence that the recommendations were based on anything other

than performance. That Clay did not provide detail with respect to the substance of all of the recommendations does not convert his consideration of such into an "informal, secretive and subjective hiring or promotion decision process[] tending to facilitate the consideration of impermissible criteria." *Roberts v. Gadsden Mem. Hosp.*, 835 F.2d 793 (11th Cir. 1988).

Plaintiff's contention that Clay's reliance on the recommendations received on behalf of some of the applicants constitutes consideration of a non-disclosed factor creating "leeway" for discrimination also must fail. Plaintiff has pointed to no evidence suggesting that Clay omitted a suggestion for recommendations from the job posting or relied on the recommendations for the purpose of discriminating against black applicants. Nor is there evidence that Clay's reliance on the recommendations constituted a deviation from the standard hiring process. Compare *Hill*, 885 F.2d at 811. That Clay relied on the receipt of the recommendations does not in itself constitute evidence of discriminatory intent and thus does not constitute evidence of pretext. Compare *Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1106 (11th Cir. 2001).

Plaintiff also contends that pretext is established by the fact that some of the employees selected for interviews did not meet the minimum qualifications for the job. Plaintiff points to evidence that Harry Lindsey, one of the employees selected for an interview, received a performance evaluation shortly before being interviewed which states that Lindsey's "performance needs improving in . . . the way he communicates with his crews and peers," that Lindsey "does not always set effective goals and objectives for himself and his crew members," and that Lindsey "does not always exhibit good listening and comprehension

skills." Pla. Resp. to Def. Mot. S.J., Ex. 19 at Q22257-58. However, Lindsey's evaluation is irrelevant because Clay testified that he did not consider an applicant's seniority or performance evaluations in making the decisions with respect to this position. Clay Dec. P 14. Plaintiff has not presented any evidence to dispute Clay's testimony that he did not consider performance evaluations.

Plaintiff also argues that pretext is established by Clay's violation of Defendants' affirmative action policy. Plaintiff points to evidence that the policy requires "reviewing the qualifications of employees to ensure that minorities . . . are given full opportunities for transfers and promotions." Pla. Resp. to Def. Mot. S.J., Ex. 31 at D5779. Plaintiff contends that Clay admitted that he did not attempt to discover anything about Plaintiff's qualifications before making the employment decision. Again, however, Plaintiff has mischaracterized Clay's testimony.

> Q. Why didn't you select (Plaintiff] to interview for the position?
>
> A. I don't know specifically about [Plaintiff] why he wasn't chosen. Didn't know him one way or another.
>
> Q. Did you attempt to find anything out about [Plaintiff]?
>
> A. No, I did not. There were a lot of people that applied and we didn't attempt to find out about a lot of them.
>
> Q. So you said a lot of people applied and you didn't attempt to find out anything about a lot of them. Is it fair to say that if you had not received a recommendation for anyone that they would not be considered?

. . . .

A. I don't know if that's fair to say or not.

Q. So if you did not receive a recommendation for a lot of the people who had applied for the job, how could you ever know what their qualifications are?

A. You know some of the qualifications from the candidate sheets, the profiles and the information you get on there. And that's basically what you know.

Clay Dep. at 99, 100. Clay's testimony indicates that he did not actively seek out information about Plaintiff but relied on the information included in the candidate profile. There is no evidence to suggest that Clay was required to actively investigate each applicant's qualifications and Clay's testimony supports a finding that Clay in fact complied the requirement that he review all the applicants' qualifications.

Plaintiff also attempts to establish pretext by attacking the credibility of Clay's declaration testimony. Specifically, Plaintiff points to Clay's declaration testimony that he relied on several factors and notes that Clay did not articulate these factors in response to requests to identify all such reasons and argues that such discrepancy constitutes evidence of pretext. However, that Defendants did not initially assert every reason justifying their decision with respect to this position does not contradict their later assertions and thus fails to support a finding of pretext.

Plaintiff further claims that he can establish pretext by showing that two of the successful candidates were not more qualified than he was for the position. Specifically, Plaintiff points to Leonard's testimony that he did not

have evidence "that would prove that [Plaintiff] was not the most qualified person for that position," Leonard Dep. at 70-71, and the hiring managers' testimony that they did not compare Plaintiff's qualifications to Edwards' and Hicks' at the time of the decision at issue. *Id.* at 50; Clay Dep. at 81-86. Plaintiff also points to evidence that he had more experience than Edwards and Hicks and that Hicks received poor performance evaluations. However, the inquiry at issue is not whether Plaintiff was the most qualified person for the position but whether the decisionmakers actually believed that Plaintiff was not. Plaintiff has provided no evidence to contradict Defendants' evidence on this point. Further, even if Plaintiff could establish that his experience made him more qualified, "in a failure to promote case, a plaintiff cannot prove pretext by simply showing that she was better qualified than the individual who received the position that she wanted. . . . Disparities in qualifications are not enough in and of themselves to demonstrate discriminatory intent unless those disparities are so apparent as virtually to jump off the page and slap you in the face." *Denney*, 247 F.3d at 1187 (internal quotation marks and citations omitted). Plaintiff's evidence that he had more experience than two of the applicants and that one applicant received a poor performance evaluation certainly fails to meet that standard.

Plaintiff has also provided statistical evidence of racial imbalances in Defendants' hiring and promotion practices as evidence of pretext. Specifically, Plaintiff has offered statistical reports to support his claim that Defendants' hiring and promotion practices had a discriminatory effect on black employees. Plaintiff argues that the reports of his expert, Dr. Madden, which find statistically significant

disparities in the promotion of black employees relative to white employees, are evidence from which a reasonable factfinder could determine that intentional discrimination occurred. Defendants contend that Plaintiff's generalized statistics are insufficient to support Plaintiff's claims of intentional discrimination.

As the Supreme Court has noted, while statistical evidence may allow the District Court to "determine . . . that the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices. . . . such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." *McDonnell Douglas*, 411 U.S. at 805 n.19 (internal quotation marks and citation omitted). In this case, Plaintiff's statistical evidence is insufficiently tailored to support his individual claims.

Plaintiff's statistics compare the promotion rate of employees within the same pay grade who perform similar job functions; however, these statistics generally fail to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to hiring decisions. Plaintiff does not provide statistics comparing employees with equivalent work experience in specific job categories or job progressions, or outcomes for those employees, both black and white, who had actually applied for posted positions challenged by Plaintiff. Plaintiff relies instead on a statistical analysis of a company-wide data pool and makes no attempt to narrow the data pool to the locations

in which he worked or the positions which he challenges. As this Court noted in the order denying class certification, the probative value of Plaintiff's statistical evidence is therefore highly questionable, in significant part due to the treatment of factors such as experience, education and specific promotion processes. *Cooper v. Southern Company*, 205 F.R.D. 596, 613-14 (N.D.Ga. 2001).

The analytical deficiencies of Plaintiff's statistics diminish the probative value of this evidence such that it cannot by itself support a claim of disparate treatment. *See Brown v. American Honda Corp.*, 939 F.2d 946, 952 (11th Cir. 1991) (holding that summary judgment was appropriate where plaintiff's statistical evidence, which lacked specific analytical foundation and thus failed to show that employer maintained discriminatory intent, was insufficient to establish *prima facie* case or pretext); *Hawkins v. Ceco Corp.*, 883 F.2d 977, 985 (11th Cir. 1989) (holding that plaintiff's statistical evidence failed to establish *prima facie* case or pretext where evidence failed to make specific analytical comparisons); *cf. James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977)[4] (holding that plaintiff's evidence of statistical disparities in hiring, promotion and compensation was sufficient to support claim of intentional discrimination where the employment decisions were based on completely subjective criteria).

Further, even if Plaintiff had evidence of pretext, Plaintiff cannot not overcome his burden of establishing

---

[4] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

discriminatory intent because the undisputed evidence shows that the decisionmakers did not know that Plaintiff is black. As noted above, in a section 2.981 case, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown v. American Honda Motor Co.*, 939 F.2d 946, 952 (11th Cir. 1991) (*citing Grigsby v. Reynolds Metal Co.*, 821 F.2d 590, 595 (11th Cir. 1987)). If the decisioninakers did not know that Plaintiff was black, they could not have intended to discriminate against him on that basis. *Cf. Trotter v. Board of Trustees of the Univ. of Ala.*, 91 F.3d 1449, 1457-58 (11th Cir. 1996); *Silvera v. Orange Co. Sch. Bd.*, 244 F.3d 1253, 1262 (11th Cir. 2001).

Defendants contend that it is undisputed that none of the individuals who made the hiring decisions concerning the Lighting Coordinator job knew that Plaintiff is black. The race of the applicants was not indicated on the computer generated list of applicants or the candidate profiles that Clay was given after the posting for the Lighting Coordinator position had closed. At the time Clay and Leonard selected candidates to interview, neither Clay nor Leonard knew Plaintiff personally, nor did they know Plaintiff's race. Clay Dec. P 16; Leonard Dec. P 8. Plaintiff attempts to create an issue of fact by pointing to the following evidence: that the decisionmakers had access to Defendants' employee pictorial directory and employee database in which Plaintiff's race is revealed; that the hiring managers could ascertain Plaintiff's race from his name; and that although Clay and Leonard may not have known Plaintiff's race, they relied on the recommendations of others who did know Plaintiff's race. The law is clear that where the decisionmaker relied upon the recommendations

of employees and does not conduct an independent evaluation, any racial animus of the other employees is imputed to the decisionmaker. However, Plaintiff has failed to put forward evidence of a racial animus on the part of any of the supervisors making recommendations; moreover, even if Plaintiff could produce it, such evidence in itself is insufficient to establish pretext. Rather, because the hiring managers did not receive a recommendation on Plaintiff's behalf, Plaintiff would also have to show that the supervisors making recommendations on behalf of other workers did so with the intent of injuring Plaintiff because of his race.

Plaintiff also contends that the selection of only white applicants constitutes evidence that the hiring managers used some means to discover Plaintiff's race and made race-based decisions as to which applicants to interview. According to Plaintiff, the statistical probability that only white applicants would be selected for interviews is less than 5%, leaving a greater than 95% chance that the selection process was not race neutral. However, the only evidence Plaintiff submits in support of this argument is an inadmissible expert report. The sum of Plaintiff's evidence only supports a finding that Clay or Leonard could have discovered Plaintiff's race and does not contradict Defendants' evidence that neither Clay nor Leonard actually knew Plaintiff's race at the time they decided which applicants to interview. Plaintiff therefore cannot establish discriminatory intent with respect to hiring decision for this position. Accordingly, Plaintiff's claim with respect to this position must fail.

Trainer

Defendants contend that they are entitled to summary judgment on this claim because Plaintiff cannot establish that Defendants' asserted non-discriminatory reason for the decision not to hire Plaintiff for this position is pretext for discrimination. In response, Plaintiff contends that he can establish a *prima facie* case and can demonstrate the Defendants' asserted reasons for the decision not to hire him are pretext.

According to Defendants, the Trainer position requires not only technical expertise and experience but also effective communication skills and the ability to instruct and teach proper methods and techniques. Defendants contend that Howard, the hiring manager for this position, knew Plaintiff through personal experience and determined that Plaintiff did not have the qualifications that Howard was looking for in this position. According to Defendants, Howard used several non-discriminatory criteria to evaluate those qualifications.

First, Howard determined that Plaintiff had not demonstrated effective communication skills or the depth of knowledge required for the Trainer position on the occasions when Plaintiff served as a guest instructor at the Training Center. Defendants contend that some Screening Committee members had told Howard that they recalled that Plaintiff had trouble drafting wiring switching orders and articulating training instructions to student employees, which indicated a deficiency in the necessary skills for the Trainer job. Howard Dec. P 20; Howard Dep. at 48-49, 87-88, 93.

Howard further contends that he did not believe that Plaintiff had up-to-date knowledge with respect to all

facets of line crew work. Howard Dec. P 18; Howard Dep. at 75, 87-88. At the time of his application for this position, Plaintiff had worked exclusively in an underground streetlight cable repair position for almost two years. Pla. Dep. I at 123; Pla. Dep. III at 147-50. Because Plaintiff's position involved only underground repair of streetlight cables, Howard determined that Plaintiff's job functions were not sufficient to maintain sufficient current knowledge in all job-related and safety aspects of underground and overhead line crew work. Pla. Dep. III at 147-50; Howard Dep. at 53-54, 75, 82, 87-88; Howard Dec. P 18. Howard asserts that he was troubled by the fact that Plaintiff's work in underground streetlight cable repair indicated that he had been working as an individual contributor, rather than as a member of a team. According to Howard, Trainers must work very closely with both the students they teach and other trainers and guest instructors, and thus they must have exemplary teamwork skills. Howard Dec. PP 5, 19; Howard Dep. at 53-54.

Defendants contend that for all of these reasons, Howard decided not to grant Plaintiff an interview for the Trainer position openings which were posted in August 1998. Instead, Howard selected other candidates from the eighty-seven applications he received and ultimately he awarded the positions to James Smith, Joseph Wheeler, Frank Gilliam, Gordy Morris, Duane Johnson, and Harry Lindsey based upon his belief that these individuals were the most qualified candidates for the job. Howard contends that he and the Selection Committee determined that each of these candidates had superior job knowledge and experience, personal development, communication skills, teamwork skills, personal initiative, safety skills, cooperation skills, customer focus, and innovation. Howard Dec. PP 22, 25.

In response, Plaintiff attempts to establish pretext by arguing that Defendants' reasons are not credible because Plaintiff actually [sic] superior qualifications. First, to establish that he had adequate job knowledge and experience, Plaintiff points to evidence that one of Defendants' employees recommended Plaintiff for a Trainer position in 1992. Plaintiff also points to the testimony of Willard Bell, his direct supervisor, that Plaintiff meets and in some cases exceeds expectations with respect to specific skills in the performance of his job and to his performance evaluation as evidence that Plaintiff actually possessed up-to-date knowledge of his job.

Plaintiff also challenges Defendants' assertion that he was not qualified for the Trainer job because he did not have sufficient skills in overhead lines. Plaintiff contends that because Howard indicated that they would have accepted Plaintiff as either an underground or overhead trainer had he been offered a position, that the successful applicant only needed skills in overhead or underground lines. Howard Dep. at 88-89. However, that Defendants were filling both underground and overhead Trainer positions does not support a finding that Defendants did not believe that a successful applicant needed up-to-date knowledge of both types of work.

Plaintiff also points to Howard's testimony that he did not actively investigate in August 1998 whether Plaintiff's job duties required him to use updated systems or whether Plaintiff had such updated knowledge. Howard Dep. at 83, 156-57. However, Howard testified that, based on information Plaintiff provided during a March 1998 interview for another Trainer opening, Plaintiff's candidate profile, and Plaintiff's performance as a guest trainer, he believed that plaintiff did not have up-to-date knowledge with respect to

overhead line work because Howard knew that Plaintiff had worked exclusively in an underground streetlight cable repair position for the past two years. *Id.* at 48-49, 82-83, 87-88, 93.

Plaintiff also points to his 1999 evaluation, which covers the period during which he applied for this job, in which his communication skills were rated as exceeding requirements and other evidence indicating that he possess good communication skills. Plaintiff also points to evidence that he possesses good teamwork skills and that his evaluation indicated that he "exceeded job requirements" in "safety & security". Pla. Resp. to Def. Mot. S.J., Ex. 15 at G8673.

However, as Defendants note, the performance evaluations cited by Plaintiff are irrelevant because they were not created until after the hiring decision was made. Further, whether Plaintiff was actually qualified for the position goes to whether Plaintiff can establish a *prima facie* case, not to whether there is evidence of pretext. The issue before the Court is whether Plaintiff has produced evidence to contradict that Howard believed that Plaintiff did not meet the selection criteria, not whether Howard's assessment of Plaintiff's qualifications was ultimately correct. *Holifield v. Reno,* 115 F.3d 1555, 1564 (11th Cir. 1997). Howard consistently testified that he believed Plaintiff did not meet the criteria Howard selected to determine who would be interviewed for the position. Plaintiff has produced no evidence to contradict Howard's testimony that he was told by individuals who observed Plaintiff as a guest instructor that Plaintiff had not demonstrated good communication skills. Plaintiff cannot dispute that Howard, the decisionmaker, reasonably believed that Plaintiff had not demonstrated good teamwork skills,

because Howard thought that Plaintiff's underground streetlight cable repair position required Plaintiff to work as an "individual contributor" rather than as a member of a team such as a line crew. Howard Dep. at 53-54, 75, 77. The Court will not second-guess a decisionmaker's assessment of whether an employee is qualified for a particular position. *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991).

Plaintiff attempts to establish pretext by arguing that the successful candidates did not meet the stated qualifications for the job. Specifically, Plaintiff points to Howard's testimony that "peer credibility" was a factor he considered when deciding whom to interview and promote. Howard Dep. at 42-43. Plaintiff contends that pretext is established by the fact that successful candidate Harry Lindsey did not have such credibility but was awarded a position anyway. To support his contention that Lindsey did not have such credibility, Plaintiff points to Lindsey's performance evaluation, which suggested that Lindsey needed improvement in this area. Pla. Resp. to Def. Mot. S.J., Ex. 19. Plaintiff also contends that Lindsey did not meet the stated requirements of communication skills, job knowledge, and teamwork because his performance evaluation suggested that he needed improvement in these areas. *Id.* However, Plaintiff does not point to any evidence that Howard reviewed Lindsey's performance evaluation at this time; indeed, Defendants' evidence suggests that Howard did not consider Lindsey's performance evaluation in making the interview decision. Howard Dep. at 72, 179. Nor can Plaintiff establish pretext with evidence that Howard and another selection committee member questioned Lindsey's credibility during his interview. The dispositive inquiry is whether Defendants discriminated

against Plaintiff when Howard did not select Plaintiff for an interview. That Howard and another committee member noted concerns about Lindsey's credibility based on events after that decision had been made is irrelevant to Plaintiff's case. Howard Dep. at 174-77.

Plaintiff also contends that two of the interviewed candidates, Chris Jarrard and Joseph Wheeler, did not possess the stated requirement of a minimum of eight years lineman experience. However, Jarrard and Wheeler both had over eight years of combined apprentice lineman and lineman experience at the time they were selected to interview for the position. Pla. Resp. to Def. Mot. S.J., Ex. 28 (Chris Jarrard); Ex. 29 (Joseph Wheeler).

Plaintiff also attempts to establish pretext simply by arguing that he was more qualified than the individuals selected for the Trainer positions. However, as noted above, it is the employer's belief rather than Plaintiff's perceptions about his own performance which are at issue. That Plaintiff possessed more seniority than some of the successful candidates is also insufficient to establish pretext. It is undisputed that seniority was not a factor used in selecting the successful applicants. As Defendants note, longevity and years of service do not necessarily translate into possession of the requisite skills and abilities for a position that requires not only knowledge and expertise, but also communication, instruction, training and teaching.

In sum, Plaintiff contends that the subjective reasons asserted are not credible based on evidence in the record. However, Plaintiff has not come forward with any evidence to establish that the decisionmakers with respect to this position did not actually find that the successful candidates

were better qualified than Plaintiff. Plaintiff's evidence is thus insufficient to permit a reasonable factfinder to conclude that the reasons given by Defendants were a pretext for intentional discrimination.

Further, even if Plaintiff could discredit one of the reasons Howard decided not to interview him, that fact would not establish that Defendants' entire proffered explanation is pretextual. *Chapman v. AI Transp.*, 229 F.3d 1012, 1024-25 (11th Cir. 2000) (holding that employer is entitled to summary judgment unless the plaintiff proffers sufficient evidence to create a genuine issue of material fact regarding whether each of the employer's articulated reasons is pretextual); *see also Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997) (granting summary judgment where plaintiff could not discredit one of employer's three proffered reasons for the challenged promotion decision).

White Co-Workers

Defendants contend that Plaintiff's claim that GPC promoted other less-qualified white employees into supervisory positions instead of him should be dismissed because Plaintiff cannot make a *prima facie* case with regard to this claim. Plaintiff does not respond to this argument and thus is deemed to have abandoned this claim.

B. Pattern and Practice

Finally, Plaintiff has failed to create a genuine issue of material fact as to whether a pattern or practice of discrimination existed. Plaintiff has offered only statistical evidence to support his pattern or practice claim. Under the pattern or practice theory, the plaintiff must provide

evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). While "statistics as to [Defendants'] employment policy and practice may be helpful to a determination of whether [Defendants'] refusal to [ ]hire [Plaintiff] in this case conformed to a general pattern of discrimination against blacks," *McDonnell Douglas*, 411 U.S. at 805, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1312 (11th Cir. 1999). The analytical deficiencies of Plaintiff's statistical evidence, discussed above, render this evidence insufficient to support a pattern or practice claim.

In addition to Plaintiff's expert reports, Plaintiff offers Defendants' internal personnel documents to support his argument that Defendants maintained a pattern or practice of compensation discrimination. While these documents indicate some disparity in compensation between black and white employees, these documents are not probative as to whether Defendants intentionally discriminated against Plaintiff during the period in question. The documents indicate average salaries of employees divided by racial classification but do not control for factors such as education, experience or skill level and thus cannot prove that Defendants discriminated on the basis of race. Plaintiff has thus failed to come forward with evidence sufficient to prove that intentional discrimination was Defendants' "standard operating

procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75 Accordingly, Defendants' motion for summary judgment with respect to Plaintiff's pattern and practice claim is GRANTED.

Accordingly, the Defendants' motion for summary judgment on Plaintiff's individual claims is GRANTED.

SO ORDERED, this 31 day of March, 2003.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, and CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., and SOUTHERN COMPANY ENERGY SOLUTIONS, INC., Defendants

CIVIL ACTION NO. 1:00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

260 F. Supp. 2d 1295; 2003 U.S. Dist. LEXIS 5675

March 31, 2003, Decided
March 31, 2003, Filed

OPINION BY: ORINDA D. EVANS

OPINION:

ORDER

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq., and 42 U.S.C. § 1981 is presently before the court on all Defendants' motion for summary judgment on the individual claims of Plaintiff Patricia Harris. For the reasons set forth below, Defendants' motion is GRANTED.

I. Facts

The following facts are undisputed unless indicated otherwise. In June 1990, Defendant Georgia Power Company ["GPC"] hired Plaintiff to work on a contract basis as

a Secretary III at a starting salary of $ 22,668.00. On July 1, 1991, after Plaintiff had been working on a contract basis for approximately one year, she was moved to a Senior Secretary position and she became a GPC employee. Between 1993 and 1997, Plaintiff worked for GPC as a Research Analyst in the Competitive Intelligence Department, and subsequently as an Economic Development Analyst in the Economic Research Department.

In or around July 1997, Plaintiff interviewed for a Market Research and Support Analyst position in the Market Research Department of Southern Company Services, Inc. ["SCS"].[1] The interview panel consisted of

---

[1] Defendants The Southern Company ["TSC"] and Southern Company Energy Solutions, Inc. ["SCES"] move for summary judgment on the grounds that Plaintiff has never been employed by nor did she ever apply for positions at TSC or SCES. Defendant GPC moves for summary judgment on the ground that Plaintiff's employment with GPC ended prior to time period relevant to this case. Plaintiff has failed to respond to SCES or GPC's motion and is deemed to have abandoned her claims against those entities. *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

A plaintiff must be an "employee" to bring a Title VII lawsuit. *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). An "employee" for Title VII purposes is an "individual[] who receives compensation from an employer." *Id.* at 1243. An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). The analysis of whether a party is an employer appears to be the same under Title VII and § 1981. *See Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (noting that these statutes have the same requirements of proof and use the same analytical framework); *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 61 n.2 (D.D.C. 1996); *Sargent v. McGrath*, 685 F. Supp. 1087, 1089 (E.D.Wis. 1988); *Alie v. NYNEX Corp.*, 158 F.R.D. 239, 245 n.3 (E.D.N.Y. 1994). Thus, Plaintiff has standing to sue TSC only if it can be shown that TSC constituted an "employer" from whom Plaintiff received compensation.

(Continued on following page)

Senior Market Research and Support Analysts Harvey Berman, Hoyt Wagner, and Gene McCloud. Plaintiff also interviewed separately with the manager of SCS's Marketing Research Department, Charles Plunkett. Defendants contend that the interview panel recommended against hiring Plaintiff based on her interviews and her lack of marketing experience or education. According to Defendants, Plunkett went against this recommendation and offered Plaintiff a Market Research and Support Analyst I position even though, given her limited work experience and her lack of any relevant educational background, he believed that she was only minimally qualified for the position.

Defendants contend that Plaintiff, as the most junior Market Research and Support Analyst, was responsible for completing projects and other tasks assigned by Plunkett and the employees holding the Market Research and Support Analyst Senior positions. Plaintiff attended several courses and seminars related to her duties as a Market Research and Support Analyst I. In fact, Plaintiff took more training courses than any other employee in the Department.

It is undisputed that TSC is a holding company which owns the stock of all other Defendants named in the complaint but has no employees. Womack Aff. P 9. Plaintiff asserts that Defendants, including TSC, created SCS as a company-wide human resources department and use SCS's "extensive involvement in personnel policy-making and employee selection processes" to maintain "substantial involvement in GPC's personnel decisions." Plaintiff fails to point to any facts in the record to support these allegations. *See Wood v. Southern Bell Telephone and Telegraph Co.*, 725 F. Supp. 1244, 1249-50 (N.D.Ga. 1989). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to TSC, SCES and GPC.

During her tenure, Plunkett awarded Plaintiff some of the highest percentage salary raises in the Department. In March of 1998, eight months after her promotion, Plunkett awarded Plaintiff a 4.2% merit raise and her base salary increased to $ 44,386.56. In March of 1999, Plunkett awarded Plaintiff a 4.9% merit raise and her base salary increased to $ 46,594.56. Plunkett also awarded Plaintiff a 15% incentive bonus, which was the highest percentage incentive bonus in the Department. Beginning with her promotion, Plunkett had increased Plaintiff's salary by more than 18%.

On August 13, 1999, Plaintiff resigned her employment and sent an unsolicited email to her co-workers which stated, in part:

> After nearly 10 years, my last day with the Southern Company will be Friday, August 13, 1999. I look back and I am in awe of how God has placed the most wonderful people and opportunities in front of me and placed them within one company – the Southern Company. I am definitely "the better for it" for having experienced the Southern Style. . . . Thank you for the opportunities.

Pla. Dep. Ex. 38. Plaintiff also sent a resignation letter to Plunkett which stated, in part:

> I have had the opportunity to work within the Southern Company system since 1990. My experience at Southern has enriched me deeply. . . . I am grateful for the positive experiences and relationships developed over the years at Southern.

Plaintiff Dep. Ex. 39. Plaintiff admits she meant what she stated in this letter.

On or about January 4, 1999, Plunkett hired John Dennis Page as a Market Research and Support Analyst II. In or around November 8, 1999, Plunkett hired Darin Klein as a Market Research and Support Analyst I. Plunkett hired Rebekah Golden as a Market Research and Support Analyst I at approximately the same time as Klein, and she began working as an SCS employee on or about November 1, 1999.

This lawsuit was filed on July 27, 2000; Plaintiff joined as a named party when the Second Amended Complaint was filed on August 14, 2000. In the complaint, Plaintiff alleges that Defendants discriminated against her by paying her less than her white co-workers and by denying her promotions. Plaintiff also claims that Defendants discriminated against her by denying her training opportunities and support.

II. Defendants' Motion for Summary Judgment

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [Defendant] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To prevail in their motion for summary judgment, Defendants must show that the evidence is insufficient to establish an essential element of Plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In ruling on Defendants' motion, the court must view the evidence in a light most favorable to Plaintiff. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). If Defendants make a sufficient showing, then

Plaintiff "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting Fed.R.Civ.P. 56(e)).

Under Title VII, an employer may be found liable for unlawful discrimination under any one of three discrete theories: disparate treatment discrimination, pattern and practice discrimination, or disparate impact discrimination. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263,1273 (11th Cir. 2000).[2] The first two theories require proof of discriminatory intent, while the third does not. *Id.* at 1273. Defendants argue that summary judgment is appropriate here because Plaintiff has failed to establish a claim of intentional discrimination or disparate impact. Plaintiff objects, arguing that there are genuine issues of material fact precluding summary judgment as to both Plaintiff's intentional discrimination and disparate impact claims. Because the theories place different burdens on the parties, the Court will address them separately.

A. Intentional Discrimination

To establish a prima facie case of race discrimination under a disparate treatment theory, Plaintiff may offer either direct or circumstantial evidence of discriminatory intent. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973);

[2] Section 1981 provides a cause of action only for claims of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976); *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999).

Alexander v. Fulton County, Ga., 207 F.3d 1303 (11th Cir. 2000). If the plaintiff presents direct evidence of discrimination, the defendant is then required to prove by a preponderance of the evidence that it would have taken the adverse employment action even in the absence of discrimination.

If the plaintiff provides sufficient circumstantial evidence to support a prima facie case, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802-03. The defendant's burden is "exceedingly light" and is "one of production, not proof." *Id.* at 802. If the defendant satisfies its burden, the presumption of discrimination is eliminated and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. *Id.*

A plaintiff may also use statistical evidence to establish either a prima facie case of discrimination or pretext. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 952 (11th Cir. 1991). Statistics may be used to establish an individual plaintiff's claim that a pattern or practice of discrimination existed, or simply to bolster the plaintiff's circumstantial evidence of individual disparate treatment. Under the pattern and practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). Even if the statistical evidence is insufficient to meet this standard, evidence establishing a discriminatory pattern "is

probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue." *Parker v. Burnley*, 693 F. Supp. 1138, 1153 (N.D.Ga. 1988) (internal quotation marks and citation omitted). Whether the plaintiff argues that the statistical evidence supports a pattern or practice claim or simply constitutes evidence of disparate treatment, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown*, 939 F.2d at 952 (11th Cir. 1991) (citing *Grigsby v. Reynolds Metal Co.*, 821 F.2d 590, 595 (11th Cir. 1987)).

1. Individual Disparate Treatment

Promotion Discrimination

In the complaint, Plaintiff alleges that Defendants discriminated against her by refusing to promote her. Defendants argue in the motion for summary judgment that Plaintiff abandoned this claim after the close of discovery but fail to indicate specifically how or when this alleged abandonment occurred. While it is therefore unclear that Plaintiff in fact abandoned this claim prior to Defendants' motion for summary judgment, Plaintiff did not make any claims with respect to promotion discrimination in her response to Defendants' summary judgment motion. Defendants are therefore entitled to summary judgment on this claim. *See Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to Plaintiff's promotion claim.

Discrimination in Training and Support

Plaintiff also alleges in the complaint that Defendants discriminated against her by denying her request to participate in a specific training course. Defendants argue that they are entitled to summary judgment because Plaintiff has failed to establish a prima facie case of disparate treatment. Plaintiff did not address this argument in her response to Defendants' motion for summary judgment. Accordingly, Defendants' motion for summary judgment is GRANTED with respect to Plaintiff's claim of discrimination in training and support. *Resolution Trust Corp.*, 43 F.3d at 599; *Hudson*, 209 F. Supp. 2d at 1329.

Compensation Discrimination

Plaintiff claims that Defendants discriminated against her by paying her less than similarly situated white employees. To make out a prima facie case of compensation discrimination, Plaintiff must establish the following four elements: 1) that she is a member of a protected class; 2) that she received low wages; 3) that similarly situated persons outside the protected class received higher wages; and 4) that she was qualified to receive the higher wages. *MacPherson v. University of Montevallo*, 922 F.2d 766, 774 (11th Cir. 1991) (applying the test in an age discrimination case). Defendants do not dispute that Plaintiff is a member of a protected class or that she received low wages but argue that they are entitled to summary judgment on this claim because Plaintiff has failed to establish that she was similarly situated to any of her white co-workers who received higher pay or that she was qualified to receive such higher pay.

"In a comparator analysis, the plaintiff is matched with a person or persons who have very similar job-related characteristics and who are in a similar situation to determine if the plaintiff has been treated differently than others who are similar to him." *Id.* Plaintiff indicated in a discovery response that she is similarly situated to several white coworkers who held the Market Research and Support Analyst I position and were paid more than she: Tracey Helinick, Kathryn Albus, Diane Cunningham, Wilbur Blackman, Jr., Darin W. Klein, Rebekah Golden, and John Page.[3] Defendants argue that none of these employees are proper comparators.

In her response to Defendants' motion for summary judgment, Plaintiff does not dispute that Helmick and Albus are not proper comparators. Nor are Cunningham and Blackman proper comparators. Although Cunningham and Blackman, like Plaintiff, occupy the Market Research and Support Analyst I position, Cunningham and Blackman work in the Load Research Department while Plaintiff works in the Market Research Department. Defendants have provided evidence to establish that the

---

[3] In her response to Defendants' motion for summary judgment, Plaintiff argues that she can also establish compensation discrimination using the Market Research and Support Analyst Seniors as comparators. Plaintiff contends that she was hired to fill a Senior level position but that Defendants discriminated against her by placing her in a Level I rather than Senior position. Plaintiff's supervisor Plunkett testified that he placed Plaintiff in the Level I position based on her relative skills and education. Plaintiff does not dispute that she did not negotiate for a higher base salary and accepted Defendants' initial offer for the new position. Plaintiff has provided no evidence to establish that she was performing the same functions as the analysts at the Senior level and thus cannot establish that the Senior analysts are proper comparators.

skills and responsibility required of analysts in the Load Research Department varies considerably from those required in the Marketing Research Department. While Plaintiff contends that Cunningham and Blackman perform functions similar to hers, she points to no evidence to support this argument.

Klein, Golden and Page, however, all occupy the Market Research and Support Analyst I position in the Marketing Research Department with Plaintiff. While Defendants have produced evidence to suggest that Klein performed some tasks that the other analysts did not, this evidence is insufficient to establish that the other analysts were performing jobs which require skills, efforts and responsibility that were not substantially equal to Plaintiff's. It is undisputed that Klein, Golden and Page earned more than Plaintiff during the period in question. Thus, Plaintiff has established that similarly situated persons outside the protected class received higher wages.

Defendants next argue that Plaintiff was not qualified to receive the higher wage because she did not have the professional experience or formal education possessed by Klein, Golden and Page. Plaintiff, who has a masters degree in business administration from the Keller School of Management at the DeVry Institute, began working as a Market Research and Support Analyst I in 1997. Although Defendants contend that Plaintiff had little or no marketing experience at that time, Plaintiff has provided evidence to support her contention that she gained marketing experience in the positions held at GPC from 1993 through 1997. Plaintiff received positive evaluations during the period in question and her performance was frequently praised; such evidence indicates that Plaintiff performed her job well and thus was at least arguably qualified to

receive wages comparable to those received by the other analysts.

However, that Plaintiff did not have the same professional experience or education as the other analysts provides Defendants' legitimate, non-discriminatory reason for Plaintiff's lower wages. When Plaintiff accepted the Market Research and Support Analyst I position, Plunkett offered Plaintiff a salary of $ 42,586.56, which was an 8% increase over her prior salary of $ 39,432.00. Defendants contend that Plunkett believed that this salary was appropriate based on Plaintiff's work history and educational background. Plaintiff neither sought to negotiate for a higher salary nor offered any justification why she should receive a higher salary.

In contrast, Defendants' evidence shows that Klein earned bachelor, masters and doctorate degrees from the University of Pennsylvania and that he had specialized in communications and research. Klein taught for over ten years at the University of Pennsylvania and at Georgia State University and had performed market research functions for a local advertising agency. Golden has a bachelor's degree and more than six years of experience in market research, holding such positions as Project Director of Marketing, Supervisor of Marketing Research, and Marketing Research Coordinator for Cox Communications. Page has a bachelor's degree in business and marketing from Winthrop University and a master's degree in marketing research from the University of Georgia. Page also worked for six months as a Market Research Management intern with Bellsouth Communications.

Plaintiff attempts to establish pretext by arguing that alleged variations in professional experience and education do not justify her lower salary. The proper pretext analysis is whether Plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997). Plaintiff first asserts that Klein's experience and education do not justify his higher salary because his work experience was primarily academic. Plaintiff then argues that Golden's higher salary is not justified because Golden had only a bachelor's degree while Plaintiff holds a master's degree. With respect to Page, Plaintiff argues that his education and professional experience do not justify his higher salary because Page, a recent graduate, had never held a full-time marketing position. Plaintiff also argues with respect to all three comparators that because she and they were placed in the same position within the same departments, the variations in experience and education are not significant enough to justify her lower salary.

However, Plaintiff's own opinion about these differences in qualifications does not give rise to a material fact dispute. Plaintiff has provided no evidence to establish that Defendants did not actually value the education and professional experiences of the other analysts more than Plaintiff's. Plaintiff cannot establish pretext merely by suggesting that, in her judgment, the other analysts were not as qualified as she. *Id.* at 1253 (noting that a plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the

employer's reasons where the reason is one that might motivate a reasonable employer).

Plaintiff asserts that pretext is also established by the testimony of other black employees in the Department that they were discriminated against by Defendants. Specifically, Plaintiff offers the sworn statements of two black employees who claim that Defendants denied them advancement opportunities and compensation comparable to that received by white employees. These statements contain conclusory, generalized allegations with few specific facts and Plaintiff provides no documentation to support the few facts alleged. These affidavits are simply insufficient by themselves to allow a reasonable factfinder to determine that Defendants' legitimate reason for Plaintiff's compensation is actually a pretext for discrimination. *See id.* at 1528.

Plaintiff has also provided statistical evidence of racial imbalances in Defendants' compensation practices as evidence of pretext. Specifically, Plaintiff has offered statistical reports to support her claim that Defendants' compensation practices had a discriminatory effect on black employees. Plaintiff argues that the reports of her expert, Dr. Madden, which find statistically significant disparities in the compensation of black employees relative to white employees, are evidence from which a reasonable factfinder could determine that intentional discrimination occurred. Defendants contend that Plaintiff's generalized statistics are insufficient to support Plaintiff's claims of intentional discrimination.

As the Supreme Court has noted, while statistical evidence may allow the District Court to "determine . . . that the (racial) composition of defendant's labor force is

itself reflective of restrictive or exclusionary practices . . . such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." *McDonnell Douglas*, 411 U.S. at 805 n. 19 (internal quotation marks and citation omitted). In this case, Plaintiff's statistical evidence is insufficiently specific to support her individual claims.

Plaintiff's statistics compare the compensation rate of employees within the same pay grade who perform similar job functions; however, these statistics generally fail to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to compensation decisions. Plaintiff does not provide statistics comparing employees with equivalent work experience in specific job categories or job progressions. Plaintiff relies instead on a statistical analysis of a company-wide data pool and makes no attempt to narrow the data pool to the locations or specific position in which she worked. As this Court noted in the order denying class certification, the probative value of Plaintiff's statistical evidence is therefore highly questionable, in significant part due to the treatment of factors such as experience, education and specific promotion processes. *Cooper v. Southern Company*, 205 F.R.D. 596, 613-14 (N.D.Ga. 2001).

The analytical deficiencies of Plaintiff's statistics diminish the probative value of this evidence such that it cannot by itself support a claim of disparate treatment. *See Brown v. American Honda Corp.*, 939 F.2d 946, 952

(11th Cir. 1991) (holding that summary judgment was appropriate where plaintiff's statistical evidence, which lacked specific analytical foundation and thus failed to show that employer maintained discriminatory intent, was insufficient to establish prima facie case or pretext); *Hawkins v. Ceco Corp.*, 883 F.2d 977, 985 (11th Cir. 1989) (holding that plaintiff's statistical evidence failed to establish prima facie case or pretext where evidence failed to make specific analytical comparisons); cf. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977)[4] (holding that plaintiff's evidence of statistical disparities in hiring, promotion and compensation was sufficient to support claim of intentional discrimination, where the employment decisions were based on completely subjective criteria).

Because Plaintiff has failed to provide any evidence of pretext, Defendants are entitled to summary judgment on Plaintiff's compensation claim. Accordingly, Defendants' motion for summary judgment is GRANTED with respect to Plaintiff's compensation claim.

2. Pattern and Practice

Plaintiff has failed to create a genuine issue of material fact as to whether a pattern or practice of discrimination existed. As discussed above, Plaintiff has provided statistical evidence in an attempt to establish a claim of pattern and practice discrimination. While "statistics as to [Defendants'] employment policy and practice may be

[4] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

helpful to a determination of whether [Defendants'] [employment decision] in this case conformed to a general pattern of discrimination against blacks," *McDonnell Douglas*, 411 U.S. at 805, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1312 (11th Cir. 1999). The analytical deficiencies of Plaintiff's statistical evidence, discussed above, render this evidence insufficient to support a pattern or practice claim. In addition to Plaintiff's expert reports, Plaintiff offers Defendants' internal personnel documents to support her argument that Defendants maintained a pattern or practice of compensation discrimination. While these documents indicate some disparity in compensation between black and white employees, these documents are not probative as to whether Defendants intentionally discriminated against Plaintiff during the period in question. The documents indicate average salaries of employees divided by racial classification but do not control for factors such as education, experience or skill level and thus cannot prove that Defendants discriminated on the basis of race. Plaintiff has thus failed to come forward with evidence sufficient to prove that intentional discrimination was Defendants' "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75. Accordingly, Defendants' motion for summary judgment with respect to Plaintiff's pattern and practice claim is GRANTED.

B. Disparate Impact

Finally, Defendants argue that Plaintiff has failed to establish a claim of disparate impact under Title VII. Because 42 U.S.C. § 1981 provides a cause of action only for claims of intentional discrimination, disparate impact claims must be brought under Title VII. This Court has already determined that Plaintiff does not have standing to pursue claims under Title VII in this case under the applicable statute of limitations. *Cooper*, 205 F.R.D. at 606. Plaintiff does not address her disparate impact claim in her response to Defendants' motion for summary judgment. Accordingly, Defendants' motion for summary judgment is GRANTED with respect to Plaintiff's disparate impact claim.

For the reasons stated above, Defendants' motion for summary judgment on Plaintiff's individual claims is GRANTED.

SO ORDERED, this 31 day of March, 2003.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, AND CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., AND SOUTHERN COMPANY ENERGY SOLUTIONS, INC. Defendants

CIVIL ACTION NO. 1:00-CV-2231-ODE C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

213 F.R.D. 683; 2003 U.S. Dist. LEXIS 5460

March 31, 2003, Decided
March 31, 2003, Filed

OPINION BY: ORINDA D. EVANS

OPINION:

ORDER

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 is presently before the court on the following motions: Plaintiffs' motion to compel production of numerous reports, data, analyses, and documents; Defendants' motion to compel production of interrogatories and all requested documents; Defendants' motion to exclude any evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information; Plaintiffs' motion for fees and costs; Plaintiffs' motion for leave to file a supplemental response

to Defendants' motion to exclude evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information; Defendants' motion to sever, or in the alternative, for separate trials; Defendants' motion to strike exhibits contained in the Plaintiffs' responses to Defendants' motions for summary judgment; Defendants' motion to strike certain affidavits contained in Plaintiffs' responses to Defendants' motions for summary judgment; Defendants' motion to strike the declaration of John Del Roccili, contained in Plaintiffs' responses to Defendants' motions for summary judgment; Plaintiffs' motion for leave to file surreplies to address new arguments in Defendants' reply memoranda; Plaintiff Edwards' motion to strike Defendants' reply brief, or in the alternative, for leave to file a response to the newly raised arguments; and Plaintiffs' motion to strike Defendants' responses to Plaintiffs' statement of disputed facts contained in Defendants' reply briefs.

The facts of this case are set out more fully in this Court's October 11, 2001 order denying class certification. A brief summary of the relevant facts follows. The seven named Plaintiffs filed this action alleging discrimination in employment based on race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 on July 27, 2000. After the Court denied Plaintiffs motion for class certification, Defendants filed motions for summary judgment on the individual claims of each of the named Defendants. In separate orders, this Court grants Defendants' motions for summary judgment on all Plaintiffs' claims. For the reasons stated below, Plaintiffs' motion to compel production of numerous reports, data, analyses, and documents is DENIED;

Defendants' motion to compel production of interrogatories and all requested documents is DENIED as moot; Defendants' motion to exclude any evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information is DENIED as moot; Plaintiffs' motion for fees and costs is DENIED; Plaintiffs' motion for leave to file a supplemental response to Defendants' motion to exclude evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information GRANTED; Defendants' motion to sever, or in the alternative, for separate trials is DENIED as moot; Defendants' motion to strike exhibits contained in the Plaintiffs' responses to Defendants' motions for summary judgment is DENIED; Defendants' motion to strike certain affidavits contained in Plaintiffs' responses to Defendants' motions for summary judgment is DENIED; Defendants' motion to strike the declaration of John Del Roccili, contained in Plaintiffs' responses to Defendants' motions for summary judgment is GRANTED; Plaintiffs' motion for leave to file surreplies to address new arguments in Defendants' reply memoranda is GRANTED; Plaintiff Edwards' motion to strike Defendants' reply brief is DENIED but the motion for leave to file a response to the newly raised arguments is GRANTED; and Plaintiffs' motion to strike Defendants' responses to Plaintiffs' statement of disputed facts contained in Defendants' reply briefs is DENIED.

Plaintiffs' motion to compel production of numerous reports, data, analyses, and documents

Plaintiffs seek to compel the production of various reports, data, analyses and documents relating to Defendants' employment policies. Upon a full review of the

record, the Court finds that Plaintiffs have failed to provide sufficient justification in their briefs for the motion to compel. The court therefore DENIES Plaintiffs' motion to compel.

Defendants' motion to compel production of interrogatories and all requested documents

In their motion, Defendants seek to compel Plaintiff Cooper's response to specific interrogatories and Plaintiffs Patricia Harris, Sarah Jean Harris and Michael Edwards' production of specific documents. Because the Court grants Defendants' motions for summary judgment on all Plaintiffs' claims, Defendants' motion to compel is DENIED as moot.

Defendants' motion to exclude any evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information

In this motion, Defendants seek to exclude evidence relating to Plaintiffs' medical conditions. Because the Court grants Defendants' summary judgment motions, the motion to exclude is DENIED as moot.

Plaintiffs' motion for fees and costs

In this motion, Plaintiffs seek an order under Federal Rule of Civil Procedure 37(b) awarding Plaintiffs their costs and fees associated with responding to Defendants' motion to compel. Under Rule 37(a)(4)(B), "if the motion is denied, the court . . . shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred

in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust." In their reply brief, Defendants raise arguments suggesting that the motion to compel was substantially justified. However, because the Court grants Defendants' motions for summary judgment and denies Defendants' motion to compel as moot, the Court does not decide the motion to compel on the merits. Accordingly, Plaintiffs' motion for costs and fees is DENIED.

Plaintiffs' motion for leave to file a supplemental response to Defendants' motion to exclude evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information

Plaintiffs contend that a supplemental response is necessary to respond to new issues raised in Defendants' reply brief. Plaintiffs' motion for leave to file a supplemental response is GRANTED.

Defendants' motion to sever or in the alternative for separate trials

Because the Court granted Defendants' motions for summary judgment on all of Plaintiffs' claims, Defendants' motion to sever is DENIED as moot.

Defendants' motion to strike exhibits contained in the Plaintiffs' responses to Defendants' motions for summary judgment

Defendants have filed a motion to strike this evidence, arguing that it is inadmissible because it is unauthenticated and constitutes inadmissible hearsay. However, this

argument is unavailing because there is no requirement that evidence be presented in admissible form at summary judgment as long as the evidence would be admissible at trial. *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996). The evidence at issue would likely be admissible at trial. *See e.g.*, 31 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure § 7105 (2000) ("Authentication can also be accomplished through judicial admissions such as . . . production of items in response to . . . [a] discovery request."); F.R.E. 803(6) (hearsay exception for business record); F.R.E. 801(d)(2)(D) (admission by party opponent does not constitute hearsay); F.R.E. 806 (hearsay exception for purposes of impeachment). In any case, because the Court finds that Plaintiffs' evidence, including the challenged exhibits, failed to create genuine issues of fact, Defendants' motion to strike is DENIED as moot.

Defendants' motion to strike certain affidavits contained in Plaintiffs' responses to Defendants' motions for summary judgment

Defendants move to strike certain affidavits submitted by Plaintiffs in support of Plaintiffs' opposition to Defendants' motions for summary judgment. The Court is inclined to agree with Defendants' argument that at least some of the challenged provisions fail to meet the requirements for affidavits submitted under Federal Rule of Civil Procedure 56. However, because the Court found that Plaintiffs' evidence, including the challenged affidavits, failed to create genuine issues of fact, Defendants' motion to strike is DENIED as moot.

Defendants' motion to strike the declaration of John Del Roccili contained in Plaintiffs' responses to Defendants' motions for summary judgment

Also pending is Defendants' Motion to Strike the Declaration of John Del Roccili. Defendants move to strike Del Roccili's declaration filed by Plaintiff in support of their opposition to Defendants' motions for summary judgment – in its entirety, alleging that the declaration is inadmissible because it does not meet the requirements for expert testimony and because the declarant lacks personal knowledge of the facts asserted as required under Federal Rule of Civil Procedure 56(e). In response, Plaintiff contends that the declaration does not constitute expert testimony and that the declaration otherwise meets the requirements of Rule 56. For the reasons stated below, Defendants' motion is granted.

The declaration, attached by Plaintiffs to each of their responses to Defendants' motions for summary judgment on the individual claims of each Plaintiff, purports to summarize information extracted from Defendants' human resources databases. According to Plaintiffs, the report does not constitute expert testimony because it does not contain expert opinion or analysis but only the declarant's summary of factual information produced by Defendants. It is true that the bulk of the report constitutes factual statements related to Plaintiffs' employment histories. However, at least three paragraphs purport to provide the results of the declarant's analysis of various facts. Del Roccili Dec. P 33 (reporting results of an analysis as to whether black employees were moved to lower pay grade level position but not compensated at the maximum salary in the lower pay grade range); *id.* at P 41 (analysis to determine the number of instances in which white employees received

a "new job" promotion and were awarded a 9% or higher salary increase); *id.* at P 48 (analysis to determine the statistical probability that none of the black applicants would be interviewed for a specific position).

The declaration is inadmissible as expert testimony because it is untimely and fails to comport with the requirements of Federal Rule of Civil Procedure 26(a)(2) and Local Rule 26.2(C). Fed R. Civ. P. 26(a)(2); Local Rule 26.2(C), N.D. Ga. The local rule provides:

> Any party who desires to use the testimony of an expert witness shall designate the expert sufficiently early in the discovery period to permit the opposing party the opportunity to depose the expert and, if desired, to name its own expert witness sufficiently in advance of the close of discovery so that a similar discovery deposition of the second expert might also be conducted prior to the close of discovery.
>
> Any party who does not comply with the provisions of the foregoing paragraph shall not be permitted to offer the testimony of the party's expert, unless expressly authorized by court order based upon a showing that the failure to comply was justified.

Local Rule 26.2(C), N.D. Ga.

Rule 26(a)(2) requires a party to identify any expert witnesses and disclose a statement of the intended testimony and its basis as directed by the court. Fed. R. Civ. P. 26(a)(2). The disclosure rule is enforced through Rule 37(c)(1), which provides that a "party that without substantial justification fails to disclose information required by [Rule 26] shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on

a motion any witness or any information not so disclosed." Fed. R. Civ. P. 37(c)(1). Plaintiffs do not contest that they failed to provide a statement summarizing Del Roccili's testimony but argue that such summary was not required because the declaration does not constitute expert testimony.

However, Del Roccili's declaration also fails to meet the requirements for fact testimony submitted in declaration form. A declaration made under penalty of perjury may be submitted in lieu of an affidavit. 28 U.S.C. § 1746. Declarations, however, are subject to the same requirements as affidavits submitted under Federal Rule of Civil Procedure 56(e). *See AirTran Airlines Inc. v. Plain Dealer Pub. Co.*, 66 F. Supp.2d 1355, 1361 (N.D. Ga. 1999). Rule 56 provides that affidavits filed in support of a motion for summary judgment "shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence." Fed. R. Civ. P. 56(e). A court, however, may only strike the inadmissible portions, and will consider the admissible portions. *See Lee v. Nat'l Life Assurance Co. of Canada*, 632 F.2d 524, 529 (5th Cir. 1980);[1] *Webster v. Fulton County*, 44 F. Supp.2d 1359, 1372 (N.D. Ga. 1999). "Rule 56(e)'s personal knowledge requirement prevents statements in affidavits that are based, in part, 'upon information and belief' – instead of only knowledge – from raising genuine issues of fact sufficient to defeat summary judgment." *Pace v. Capobianco*, 283 F.3d 1275, 1278 (11th Cir. 2002). In the declaration, Del Roccili makes the following disclosure:

---

[1] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

> I have been asked by plaintiffs [sic] counsel to examine or to have someone examine under my supervision the data that has been produced in discovery by the defendants [sic] companies ("SoCo") and report information relating to the individual plaintiffs as identified below. It is my understanding that the data I have received are extracted from SoCo's human resources databases. . . . I declare that the following paragraphs accurately cite and reflect data contained within the databases I have received from SoCo.

Del Roccili Dec. PP 2-3. That Del Roccili does not have personal knowledge of the facts to which he attests – that documents from Defendants' databases contain the information he reports in his declaration – precludes the consideration of his declaration in deciding Defendants' motion for summary judgment. Accordingly, Defendants' motion to strike is GRANTED.

Plaintiffs' motion for leave to file surreplies to address new arguments in Defendants' reply memoranda

In this motion, Plaintiff [sic] argue that they should be allowed to file sur-replies to Defendants' reply briefs filed in support of their motions for summary judgment. Plaintiffs' motion is GRANTED.

Plaintiff Edwards' motion to strike Defendants' reply brief, or in the alternative, for leave to file a response to the newly raised arguments

In this motion, Plaintiff Edwards seeks to strike Defendants' reply brief filed in support of Defendants motion for summary judgment on Plaintiff Edwards' claims. Plaintiff argues that Defendants' reply brief

contains new arguments that Defendants failed to address in their motion for summary judgment. Upon a full review of the record, the Court finds that an order striking the motion is unwarranted and Plaintiff Edwards' motion to strike is therefore DENIED. However, Plaintiff Edwards' motion for leave to file a response to newly raised arguments is GRANTED.

Plaintiffs' motion to strike Defendants' responses to Plaintiffs' statement of disputed facts contained in Defendants' reply briefs

In this motion, Plaintiffs seek an order striking Defendants' responses to Plaintiffs' statement of disputed facts contained in Defendants' reply brief. Upon a full review of the record, the Court finds that an order striking the motion is unwarranted and Plaintiffs' motion to strike is therefore DENIED.

Accordingly, for the reasons stated above, Plaintiffs' motion to compel production of numerous reports, data, analyses, and documents is DENIED; Defendants' motion to compel production of interrogatories and all requested documents is DENIED as moot; Defendants' motion to exclude any evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information is DENIED as moot; Plaintiffs' motion for fees and costs is DENIED; Plaintiffs' motion for leave to file a supplemental response to Defendants' motion to exclude evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information is GRANTED; Defendants' motion to sever, or in the alternative, for separate trials is DENIED as moot; Defendants' motion to strike exhibits contained in the Plaintiffs' responses to

Defendants' motions for summary judgment is DENIED as moot; Defendants' motion to strike certain affidavits contained in Plaintiffs' responses to Defendants' motions for summary judgment is DENIED as moot; Defendants' motion to strike the declaration of John Del Roccili, contained in Plaintiffs' responses to Defendants' motions for summary judgment is GRANTED; Plaintiffs' motion for leave to file surreplies to address new arguments in Defendants' reply memoranda is GRANTED; Plaintiff Edwards' motion to strike Defendants' reply brief is DENIED but the motion for leave to file a response to the newly raised arguments is GRANTED; and Plaintiffs' motion to strike Defendants' responses to Plaintiffs' statement of disputed facts contained in Defendants' reply briefs is DENIED.

All matters in this case having been ruled upon, the Clerk is directed to enter judgment for Defendants, with each side to bear its own costs.

SO ORDERED, this 31st day of March, 2003.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, and CAROLYN WILSON, Individually and as Class Representatives, Plaintiffs, v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., and SOUTHERN COMPANY ENERGY SOLUTIONS, INC., Defendants.

CIVIL ACTION NO. 1:00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

205 F.R.D. 596; 2001 U.S. Dist. LEXIS 16809

October 11, 2001, Decided
October 11, 2001, Filed

OPINION BY: ORINDA D. EVANS

OPINION:

ORDER

This putative class action alleging discrimination in employment based on race in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 ("Section 1981") is presently before the Court on Plaintiffs' motion for class certification. The motion includes a request for an evidentiary hearing.

Both sides have filed designations of the evidence they would present if an evidentiary hearing were held. The Court has reviewed the designations, and finds the referenced evidence is already substantially included in the voluminous record, including appendices of documents,

affidavits and deposition excerpts which have been reviewed by the Court. An evidentiary hearing is not needed. Thus, Plaintiffs' request for an evidentiary hearing is DENIED.

After reviewing the record and the briefs filed by both sides, Plaintiffs' motion for class certification is DENIED for the reasons stated below.

TABLE OF CONTENTS

I Introduction

II The Defendants

III The Named Plaintiffs

IV Standing

V Allegations of Class Wide Discrimination As Set Forth in the Complaint

VI Evidence Relied Upon by Plaintiffs to Obtain Class Certification

VII Legal Standards

1. Rule 23(a)

A. Numerosity

B. Commonality and Typicality under Rule 23(a)(2-3)

1. Typicality

2. Commonality

a. Murphy Report

b. Madden Report

c. Noose Evidence

d. Racial Slurs and Jokes

e. Glass Ceiling

f. Alleged Policy of Ignoring Policies

g. Prospective Class Members' Affidavit Establishing their Own Experience With Defendants

h. Indifference of Senior Management

i. Legal Discussion

C. Adequacy of Representation

2. Rule 23(b)(2)

3. Rule 23(b)(3)

4. Hybrid Certification

VIII SUMMARY

I. INTRODUCTION

This is an action brought by seven present or past employees of the various Defendants seeking to represent a class of all African-American employees of Defendants, including upper and middle management level employees, office and clerical staff, commission-paid sales personnel, and unionized operations, maintenance and construction personnel.

Pursuant to Rule 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure, Plaintiffs request certification of the following class:

> All African-American persons employed by Southern Company's Corporate Office, Georgia Power Company, Southern Company Services, Inc. or Southern Company Energy Solutions, Inc., in the United States at any time from July, 1998 to the present, who are subject to the Defendants' employment, personnel and human resources policies and practices and who have

> been, continue to be, or may in the future be adversely affected by the Defendants' racially discriminatory employment policies and practices ("the Class").

(Plaintiffs' motion for class certification, pp. 1-2; Complaint). The proposed class encompasses approximately 2,400 people.

Plaintiffs' Third Amended Complaint ("Complaint") alleges discrimination in promotions compensation, training and evaluations, and requests back pay, compensatory damages, punitive damages, declaratory relief,[1] and injunctive relief.[2] The Named Plaintiffs allege various acts of racial discrimination by Defendants at Defendants' locations in the metropolitan Atlanta, Georgia area. The prospective class members reside in Georgia, Alabama, Florida, and Mississippi.

II. THE DEFENDANTS

Defendant Southern Company ("TSC") is a holding company which owns the stock of all other Defendants named in the complaint. TSC has no employees. (Womack Aff., P 9).[3] Plaintiffs allege that TSC has 26,000 employees in the United States; presumably this was the number of

---

[1] The Complaint seeks a declaration that "Defendants' acts and practices as set forth herein are in violation of the laws of the United States."

[2] The Complaint requests "preliminary and permanent injunctive relief to end Defendants' discriminatory practices and to prevent current and future harm to the Named Plaintiffs and the Class."

[3] Christopher Womack is the Senior Vice President of Human Resources for Defendant Southern Company Services, Inc. ("SCS").

individuals employed by TSC's subsidiaries in the United States when the complaint was filed.

Defendant Georgia Power Company ("GPC") is the largest subsidiary of Defendant Southern Company and is the nation's largest generator of electricity. (Complaint, P 17). It serves customers in 153 of Georgia's 159 counties. It employs approximately 9,000 employees at different locations throughout Georgia. GPC's headquarters is in Atlanta, Georgia. GPC is divided into five business units: (1) Customer Operations; (2) Marketing; (3) Finance; (4) External Affairs (including Governmental and Regulatory Affairs, Community and Economic Development, Environmental Affairs, Land Management, Risk Management and Public Relations); and (5) Corporate Relations. *Id.* at PP 9-20. GPC also has employees working in GPC's fossil fuel, hydro-electric and nuclear power generating plants which are operated by Southern Company Generation ("SCG").[4] The majority of GPC's employees work in generating plants throughout the state of Georgia.

GPC has a collective bargaining agreement ("CBA") with the International Brotherhood of Electrical Workers ("IBEW"), Local No. 84, which covers forty-four percent of its employees. Over two-thirds of GPC's union workforce is in maintenance/construction or in operations. Fifteen percent of GPC's employees covered by the CBA have

[4] SCG is an independent business unit of TSC which has a sub-organization for each operating company. SCG manages the generation of electricity at GPC's generating plants. All employees working at those plants are employees of GPC, but they are supervised by SCG managers.

college degrees. About twenty-two percent of the covered employees are African-American.[5]

Defendant Southern Company Services ("SCS") has contracted with TSC and each of its subsidiaries to furnish human resources and EEO functions for them. SCS employs approximately 3,000 employees in Georgia and Alabama. SCS is not unionized. (Lightfoot, P 14).[6] Eighty-four percent of SCS' employees are in positions exempt from the requirements of the Fair Labor Standards Act. Seventy-five percent of SCS' exempt employees hold college degrees. Thirty-six percent of the exempt employees hold engineering degrees and twenty-four percent have graduate degrees.

Defendant Southern Company Energy Solutions ("SCES") is a non-regulated, non-utility subsidiary of Defendant TSC which develops and sells energy-related products and services. At the time the instant suit was filed, SCES had approximately 268 employees in Georgia, Alabama, Florida, and Mississippi. (Haworth Aff., P 8).[7] Fifty-three percent of SCES' employees are in exempt

---

[5] Plaintiffs' brief, p. 12, states that about one-half of Defendants' covered workforce is African-American, citing Plaintiffs' Exhibit 21. This appears to be an incorrect interpretation of the Exhibit. According to the report of Dr. Haworth, p. 11, 21.9% are African-American. Either way, a substantial part of the class Plaintiffs seek to have certified is covered by the CBA.

[6] Henry Lightfoot is the Manager of Labor Relations at Defendant GPC.

[7] Dr. Joan G. Haworth is a labor economist and econometrician retained by Defendants to conduct economic and statistical analyses of Defendants' employment policies as well as Plaintiffs' claims of discrimination.

positions. Most of SCES' employees sell energy-related products and are commission paid.

The Defendants maintain a common job, salary, or pay grade system[8] which was formulated by Defendant SCS for non-exempt employees (grades NE1 through NE9) and exempt employees (grades E1 to E15). Salaries for covered employees are determined by the CBA.

The record contains information concerning the range of salaries payable under different exempt and non-exempt salary grades. *See* Plaintiff's Exhibit 72. The CBA contains the salary designations for bargaining unit jobs. *See* Lightfoot Aff., Exhibit C. In 1998, grade E5 ranged from $42,396 to $67,837. Grade E3 was approximately $34,020 to $54,432. According to David Ratcliffe, President of Defendant GPC, the management level is considered to begin at E7. One of the Named Plaintiffs who currently works for Defendants is in exempt grade 5; one is at exempt grade 2; the other is a non-exempt employee. Prior to her resignation, Plaintiff P. Harris was in grade E5 as a market research analyst.

Plaintiffs complain of the breadth of the salary ranges in the various job or salary grades. They state that it is possible for an employee to be in a higher grade than another, yet earn less money. Plaintiffs assert that this is a means of masking discrimination against African-Americans. It is correct that the salary ranges overlap.

While all of the Defendants use the same salary grade system, within different subsidiaries a particular job may

[8] The record variously refers to these grades as salary grades, pay grades or job grades. The terms mean the same thing.

"top out" at a different salary grade from another on account of the attributes of that position within that particular subsidiary. Also, not all positions exist within every subsidiary.

Defendants utilize common compensation and promotions policies promulgated and administered by Defendant SCS, as follows.

JobNet Postings

The majority of Defendants' vacancies for non-covered positions are filled by posting the position on Defendant TSC's computer intranet system known as "JobNet," which is accessible to virtually all employees. Required qualifications for the job and the job duties are stated in the posting. The applications are screened by managers and sometimes by Human Resources ("HR") personnel and an interview list is derived. Part of HR's job is to seek diversity in the list. SCS recommends that all candidates who receive an invitation to interview for a position be asked the same questions and provides "structured interview" guidelines which are tailored to the skills needed for the job under consideration. Specific questions are provided which should be asked of all interviewees. SCS recommends that a selection committee evaluate the candidates and determine by consensus which is best for the position. Scoring sheets are provided for the committee members' use. (Wolfe Aff., PP 5-30).

The Defendants have submitted numerous affidavits from their managers which state that they use selection committees. However, they are not required to do so. Even in cases where a selection committee is used, the manager is not required to accept the committee's recommendation.

Leadership Development/Developmental Moves

Defendant companies utilize leadership development programs which are designed to identify employees who have demonstrated leadership potential and to provide them with opportunities to obtain experience in other areas. (Harber Aff., P 45).[9] They also maintain a professional mentoring program and a professional development program. All of these programs are partly intended to increase diversity at the management level.

Defendants seek to identify talent and sometimes make promotions or transfers as a "developmental opportunity." These developmental opportunities are not posted on Defendants' JobNet system. Plaintiffs complain that "developmental moves" tend to be offered to Caucasians in preference to blacks.

Performance Evaluations

SCS recommends that employees receive written evaluations, using a prepared form. A sample of the form is attached to Plaintiffs' Complaint as Exhibit D.

Progressive Promotions

Advances within a 'job family' for example, from engineer III to engineer II, are not posted as they do not reflect a job vacancy. Instead, an employee may receive a progressive promotion when she accomplishes certain predetermined goals or milestones associated with a position, or has demonstrated satisfactory performance over a

[9] Kathy Harber is the leadership development consultant at Defendant SCS.

sustained period of time. (Conoly Aff., P 13).[10] Plaintiffs assert that progressive promotions are discriminatorily denied to African-Americans because their performance and achievements are not fairly evaluated.

Job Re-evaluations

Managers have the discretion to re-evaluate jobs within their departments if they determine that the actual skills required are above or below those anticipated by the job criteria.

Job Rotation

There are occasions when two employees rotate jobs on a temporary basis so that each employee can learn new skills and gain a broader range of experiences. (Eavenson Aff., P 10; Hinson Aff., P 20).[11] Plaintiffs contend that African-Americans do not receive the same opportunities as whites for job rotation.

Merit Increases and Incentive Bonuses

Senior management within each organization provides guidelines to managers concerning merit increases. Managers and supervisors within individual departments have discretion to determine how to allocate individual merit increases.

---

[10] Warren Conoly is the general manager of distribution services for Defendant GPC.

[11] James Eavenson is the Manager of Fleet Operations for Defendant GPC. W.R. Hinson is the assistant comptroller for Defendant GPC.

Most non-covered employees at Defendants GPC, SCS, and SCES are also eligible for lump sum incentive bonuses under a performance pay plan ("PPP").[12] Some managers allocate the same percentage to all employees regardless of performance while others allocate varying percentages in accordance with the achievement of individual or team goals. (Harvey Aff., P 19).

Plaintiffs complain that in practice managers discriminate against African-Americans in giving merit increases and incentive bonuses.

Affirmative Action/EEO

The Defendants have affirmative action plans, a Diversity Advisory Team, yearly goals for increasing diversity (the 2000 goal was to increase representation of women and minorities at Exempt Job grade 7), and other stated means of seeking diversity in the workforce including external recruitment. *See* Womack Aff., Plaintiffs' Exhibit 27. Plaintiffs assert that these procedures are ineffective.

Vacancies under the CBA

All transfers and promotions among covered positions are governed by the terms of the CBA. (Eavenson Aff., P 12). Managers have little discretion in the method or criteria used to fill these jobs. (Lightfoot Aff., PP 7-8). Instead, managers identify their needs and call the Labor

[12] Covered employees at GPC and employees working under a commission sales plan or an alternative compensation plan are not eligible for a PPP bonus. (Wilkinson Aff., P 11).

Relations Department at which point the jobs are posted and filled with the most senior bidder. (Hartz Aff., P 11).[13] The CBA provides that certain "lead" jobs will be awarded based on seniority, competency being equal. GPC does use written tests in gauging competency for this purpose. The CBA does not appear to cover the position of foreman. *See* Lightfoot Aff., Exhibit C.

III. THE NAMED PLAINTIFFS

Plaintiff Cornelius Cooper, one of seven Named Plaintiffs, is an African-American male employed by GPC as a lineman in Atlanta, Georgia. After high school graduation in 1970 Cooper worked in the concrete finishing business with his father. (Cooper Depo., p. 13). He has been employed by GPC since 1973 when he began working as a helper. Since that time, Cooper has worked as a winch truck operator, apprentice lineman, lineman, and lead lineman, all within the Customer Operations Division in or near metro Atlanta. (Cooper Depo., pp. 18-37, 47-50). He joined Local No. 84 of the International Brotherhood of Electrical Workers. The terms and conditions for all of these positions are covered by GPC's CBA.

Cooper has never taken the first line supervisor test, which has been identified by the Plaintiffs as a test which unfairly blocks African-Americans in covered positions from advancing to foreman. He has not applied for a foreman position since 1989 or 1990, as there have been no foreman positions open in his part of GPC since then.

---

[13] Todd Hartz is the general manager of transmission maintenance for Defendant GPC.

Cooper Depo., p. 299. He has never applied for a crew leader position. *Id.* at 299.

Plaintiff Cooper alleges that he applied but was not selected for a non-covered (*i.e.*, non-union) position as trainer within the two year period[14] before this suit was filed. (Complaint, P 78). One of the positions was awarded to Charlie Johnson, an African-American. (Cooper Depo., p. 266). Several positions as trainer were open at that time. Cooper did not file a charge with the Equal Employment Opportunity Commission ("EEOC"). (Cooper Depo., p. 213).

Plaintiff Cooper also states that he previously had applied for numerous other non-covered postings. He was interviewed but not selected. *Id.* at 294. Cooper was unable to identify any instances of alleged harassment or any racially offensive comments, documents, objects, or other items within the two years preceding the filing of this suit. (Cooper Depo., pp. 213-220).[15]

Plaintiff Michael Edwards is an African-American male who has been employed as a lineman by Defendant GPC in Atlanta, Georgia. Following high school graduation in 1978, he enlisted in the United States Marine Corps. *Id.* at 10. During his tenure in the Marines, Edwards became certified as an aircraft mechanic.

---

[14] Two years is the period of limitation for a Section 1981 claim. *Hill v. Metropolitan Atlanta Rapid Transit Authority*, 841 F.2d 1533, 1546 (11th Cir. 1988), *modified on other grounds*, 848 F.2d 1522 (11th Cir. 1988).

[15] In his deposition, Plaintiff Cooper described two racist comments which occurred more than two years prior to the filing of this lawsuit.

Edwards was hired by GPC in 1987. He has held various positions including utilityman and helper positions at Plant Vogle near Augusta, Georgia, an unassigned apprentice lineman position in Augusta and Hinesville, Georgia, and a lineman position (Customer Operations) in Tucker, Georgia. (Complaint, P 86). Each of these positions is covered by the CBA. He has had several extended absences as well as light duty assignments as a result of various injuries and medical conditions. (Edwards Depo., pp. 16-18). Plaintiff Edwards states that he left work due to injury on May 18, 1998 and returned on November 22, 1998. He then held a temporary position until that position was eliminated in April, 2000. *Id.* Edwards has been out of work on disability leave since that time. *Id.* at 18.

Plaintiff Edwards generally asserts that he has been denied promotions on the basis of his race. He applied and was interviewed for a cable locator position in March, 2000 which would have involved a cut in pay from lineman's pay[16] but which would have accommodated his physical limitations. The cable locator position was awarded to a Caucasian applicant. (Edwards Depo., pp. 93-94; Complaint, PP 88-89).

Edwards filed a complaint with the EEOC in 1999 alleging violation of the Americans with Disabilities Act. This claim did not mention race discrimination. Edwards has not identified any instances of harassment within the two years preceding the lawsuit. He states he did see a toy skeleton hanging from a cork board in the men's locker room at one facility before that. *Id.* at pp. 127-29. At about the time this lawsuit was filed, he filed a charge of discrimination with

[16] It is not clear that this position would have been a promotion.

the EEOC alleging individual and class-wide claims of race discrimination against Defendants and received a Notice of Right to Sue. (Complaint, P 93).

Plaintiff Charcella Green is an African-American female who is currently employed by Defendant GPC as an education services coordinator in Atlanta, Georgia. Green graduated from high school in Atlanta, Georgia in 1967 (Green Depo., p. 60) and received a B.S. degree in human services administration from Mercer University in 1981. In 1983 she received a master's degree in social work from Clark Atlanta University. In 1999 she received a Ph.D. degree. *Id.* at 69.

Green began working for GPC in 1983 in a temporary internship position in External Affairs. Subsequently she held positions as associate public information representative, assistant to the director of corporate communications, education services coordinator, communications coordinator, and area development organizer advisor. These are exempt positions. Her current position is at salary grade 5. Plaintiff Green alleges that she was denied an educational services manager position awarded to a Caucasian applicant on July 11, 1998.[17] (Complaint, P 110). Green believes the current holder of this position is at salary grade 7. (Green depo., p. 206). Green alleges that she has been compensated less favorably than several similarly situated Caucasian co-workers, and that several Caucasians with less education and seniority have received job rotations or other developmental moves that she has not received. (Complaint, PP 113-16). Green has not identified any

[17] This date is more than two years before the filing of the instant action.

workplace comments or conduct which could be characterized as racially hostile. She did not file a complaint with the EEOC.

Plaintiff Patricia Harris ("P. Harris") is an African-American female and a former employee of both Defendant GPC and Defendant Southern Company Services ("SCS") where she worked as a marketing research analyst. Harris received an associate degree from Gordon College in 1981. In 1985, she received a biology degree from Georgia State University in Atlanta, Georgia. Subsequently, in 1997, she earned an MBA degree from Georgia State University. (Complaint, P 154).

Plaintiff P. Harris began working for Defendant GPC as a secretary in 1990 in Marketing and Regulatory Affairs. After working for Defendant GPC for thirteen months, she was offered a permanent position and promoted to senior secretary by her supervisor, Buddy Cromer. (P. Harris Depo., p. 36). Subsequently, Harris advanced through several positions including research analyst and economic development analyst. These are exempt positions. (P. Harris Depo., pp. 34-39).

In 1997, P. Harris became an employee of SCS in a market research analyst position, an E5 grade position. (Complaint, P 159). The Complaint states that "[although the salary range for an E5 employee in 1998 was $42,396 to $67,836, [Plaintiff P. Harris' salary was only approximately $45,000." (Complaint, P 155). She generally alleges that she experienced racial discrimination in promotions, compensation and performance evaluations.

Plaintiff P. Harris applied for no promotions during the relevant two year period except for a liaison position which she could not identify. (P. Harris Depo., pp. 147,

259-60). She did not file a charge of discrimination with the EEOC. She could not identify any patently offensive racial comments, conduct, documents, objects, or events during the two year period preceding this lawsuit. *Id.* at 173-78. Plaintiff P. Harris voluntarily resigned in August, 1999. *Id.* at 16.[18]

Plaintiff Sarah Jean Harris ("S.J. Harris") is an African-American female who was employed by Defendant GPC from 1979 until mid-2000. Following graduation from high school in 1963, she took courses in shorthand, accounting, data processing and real estate law at Gwinnett Area Technical College and received certificates for completing numerous courses. She began working as a utility operator for Georgia Slack Company in approximately 1966. *Id.* In 1973, she began working as a secretary for Sears department store in Atlanta, Georgia. She also worked as a sales associate at Belk department store and as a bank teller at Gwinnett Federal Bank.

S.J. Harris began as a general "Clerk B" in a Region Operations facility in Lawrenceville, Georgia, moved to a secretary position in another facility as part of a reorganization in 1994, and became a region support representative in 1997. (S.J. Harris Depo., pp. 31-37, 62). These positions were not covered by the CBA and appear to be non-exempt positions.

---

[18] Plaintiff P. Harris submitted a resignation memo to her supervisors which stated, "my experience at Southern has enriched me deeply . . . I am grateful for the positive experiences and relationships developed over the years at Southern." In another memo, written to her coworkers, Plaintiff P. Harris stated, "I look back and I am in awe of how God has placed the most wonderful people in front of me and placed them within one company – the Southern Company. I am definitely 'the better for it' for having experienced the Southern style.

S.J. Harris did not apply for any promotions during the relevant period. She could not identify any instances of a hostile environment during the relevant period. *Id.* at 157.

Plaintiff S.J. Harris received several poor evaluations and was placed in "positive discipline" in 1999. (S.J. Harris Depo., pp. 78-94, 101-02). Ultimately, she received higher levels of discipline, including probation. *Id.* at 106. Her employment was eventually terminated as a result of an incident during her probationary period. *Id.* at 158-60. Plaintiff S.J. Harris contends that her performance evaluations were tainted by intentional discrimination and that her termination was in retaliation for her participation in the instant litigation. *Id.* at 69-70. She filed a charge with the EEOC shortly after being terminated in the summer of 2000.

Plaintiff Irene McCullers is an African-American female hired by Defendant GPC as a file clerk in 1978. (McCullers Depo., p. 39). Before that she attended Blatton Business College, a two year business college in Atlanta, Georgia, and also worked in the claims department at Cotton States Insurance Company for approximately six years. *Id.* at 37.

In addition, McCullers has held at least ten other positions, in five separate job grades, including micrographics clerk, accounting clerk, accounting representative, document processing operator in finance at GPC, and processing operator I with the SCS Information Management Services Department. These are non-covered, non-exempt positions. She alleges she has experienced racial discrimination in promotions, compensation and performance evaluations. Specifically, Plaintiff McCullers alleges that she has received consistently low performance

evaluations and that she has received lower annual increases than her Caucasian co-workers. *Id.* at 133-35. In her deposition, Plaintiff McCullers failed to identify any examples of a hostile work environment within the relevant two year period. *Id.* at 146-52. Although she has never applied for a posted position, she alleges that she has been denied a number of progressive promotions. (McCullers Depo., p. 55; Complaint PP 151-52). In her deposition, Plaintiff McCullers stated that she never heard any racial epithet by any co-worker, supervisor, or manager during her employment. *Id.* at 63. McCullers did not file an EEO charge.

Plaintiff Carolyn Wilson is an African-American female employed by Defendant Southern Company Energy Solutions ("SCES") as a Project Analyst III in Forest Park, Georgia. Wilson attended college at Mercer University in Atlanta, Georgia.(Wilson Depo., p. 35) and also studied electronics as a Lance Corporal in the United States Marine Corps. *Id.* at 37.

Plaintiff Wilson initially worked for Defendant GPC in Customer Service beginning in 1985. (Wilson Depo., p. 11). She received several promotions before she applied for and received a project analyst position at SCES in 1997. She also applied and interviewed for a customer service representative position in 1998 and, after receiving an offer, declined it. *Id.* at 160-61. Wilson's current position, project analyst III, is an exempt position at salary grade 2. Wilson generally alleges that she has experienced racial discrimination in promotions, compensation and performance evaluations. She also claims that she was promised a $10,000 raise, but that she received only half of that amount. (Complaint, PP 132, 137). Also, she alleges that she was denied training opportunities by another African-American

employee in Human Resources, and that she has not received performance evaluations. *Id.* at P 141; Wilson Depo., pp. 38-41). Plaintiff Wilson has not identified any patently offensive racial comments, conduct, documents, objects, or events in the workplace during the two-year period. (Wilson Depo., pp. 88-97).[19] Wilson filed a charge with the EEOC at the approximate time this lawsuit was filed. The EEO complaint stated that she had been subjected to discrimination, but was unspecific as to the event or events comprising the discrimination.

Summarizing, the seven named Plaintiffs include three persons who no longer work[20] for any Defendant. Of the remaining four who are currently employed, one is a lead lineman whose rate of compensation is covered by a collective bargaining agreement. Two hold non-management, exempt positions in Atlanta, Georgia. One holds a non-exempt position. One of these four Plaintiffs (Plaintiff Wilson) filed a complaint with the EEOC complaining of disparate compensation and only Plaintiffs Cooper and Wilson were denied a competitive promotion within the two year period immediately preceding the filing of this suit.

IV. STANDING

Before a district court may undertake analysis of whether the requirements of Rule 23 of the Federal Rules

---

[19] Plaintiff Wilson did state that on one occasion a co-worker asked her "what's wrong with black women?". (Wilson Depo., p. 90).

[20] The Court includes in this group Plaintiff Edwards, whose position was eliminated in April 2000 and who has been on disability leave since then.

of Civil Procedure are met so as to permit certification of this case as a class action, the court must first "determine that at least one named class representative has Article III standing to raise each class subclaim." *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000). "Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others." *Prado-Steiman*, 221 F.3d at 1280 (*citing Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987)). "A named plaintiff in a class action who cannot establish the requisite case or controversy between himself and the defendants simply cannot seek relief for anyone – not for himself, and not for any other member of the class." *Griffin*, 823 F.2d at 1483. "Under elementary principles of standing, a plaintiff must allege and show that he personally suffered injury." *Id.* at 1482. Each claim asserted by a named plaintiff "must be analyzed separately, and a claim cannot be asserted on behalf on a class unless at least one named plaintiff has suffered the injury that gives rise to that claim." *Prado-Steiman*, 221 F.3d at 1280 (*citing Griffin*, 823 F.2d at 1483).

After thoroughly examining the record,[21] the court has made the following determinations regarding Named Plaintiffs' standing to assert various claims:

Cornelius Cooper has standing, under § 1981 only, to assert a discrimination in promotion claim based upon his

[21] The court rejects the notion that Plaintiffs were not required to file an EEOC Charge within 180 days of any discriminatory incident. To the extent that Plaintiffs rely on undated activity, the court has not considered this in the issue of standing.

denial of promotion to a trainer position on August 26, 1998.

Michael Edwards has standing, under both Title VII and § 1981, to assert a discrimination in promotion claim based upon the denial of a cable locator position in April 2000.

Sarah Jean Harris has standing to assert discrimination in evaluation and compensation claims under Title VII and § 1981.

Carolyn Wilson has standing to assert a discrimination in compensation claim under Title VII and § 1981 and has standing to assert a discrimination in promotions claim under § 1981 only.

Charcella Green has standing to assert a discrimination in compensation claim under § 1981. She would have standing as a class member to assert a Title VII claim based on the EEO charges filed by Carolyn Wilson if this case were certified as a class action.

Irene McCullers has standing to assert a discrimination in compensation claim under § 1981 and has standing to assert a discrimination in progressive promotions claim under § 1981 based on Defendants' failure to promote her to Processing Operator Senior. She would also have standing to assert these claims under Title VII cased on Carolyn Wilson's EEO charge if this case were certified as a class action.

Patricia Harris has standing to assert discrimination in compensation and promotion claims under § 1981 only.

The Named Plaintiffs have no standing to assert other claims.

V. ALLEGATIONS OF CLASS WIDE DISCRIMINATION AS SET FORTH IN THE COMPLAINT

Section V of the Complaint sets out Plaintiffs' allegations of class-wide discrimination. Plaintiffs urge that there is a class wide "continuing pattern and practice of racial discrimination"; that they and the class have been subjected to discriminatory treatment; and that "the Defendants' policies and practices have had an ongoing disparate impact." (Complaint, PP 31, 32). The Complaint, Section V, sets out as the ways in which Defendants discriminated against African-Americans the following:

> d. Failing to promote African-Americans to the same level or at the same rates as similarly-situated Caucasians;
>
> e. Maintaining written and unwritten policies and practices regarding job opportunities, including the use of a highly subjective job posting and interview process, that significantly hamper the ability of African-Americans to advance and obtain open positions;
>
> f. Creating and maintaining a "glass ceiling" that virtually excludes African-American employees from obtaining senior-level positions;
>
> g. Paying non-covered African-American employees less than Caucasian employees who perform the same or similar work;
>
> h. Maintaining written and unwritten policies and practices for determining compensation that result in non-covered African-Americans receiving lower compensation than their Caucasian counterparts;
>
> i. Maintaining written and unwritten policies and practices for performing evaluations of employees

that provide managers with significant discretion and allow them to place inappropriate weight on subjective criteria, resulting in biased and inconsistent performance evaluations;

j. Failing to provide African-American equal terms and conditions of employment, including subjecting African-American employees to a racially hostile environment;

k. Failing to properly monitor and oversee employment, personnel and human resources practices and failing to provide adequate training and oversight of supervisors to ensure that Company policies are applied consistently and in a nondiscriminatory manner.

VI. EVIDENCE RELIED UPON BY PLAINTIFFS TO OBTAIN CLASS CERTIFICATION

Plaintiffs base their motion for class certification on a number of evidentiary sources: selected deposition excerpts, affidavits, a large number of documents (mostly documents generated by Defendants), the expert report of an economist, Dr. Janice Madden, analyzing promotions and salary data, and the expert report of Dr. Kevin Murphy, a psychologist.[22]

[22] Defendants have submitted a large number of affidavits mostly describing the companies' policies and procedures regarding promotions and compensation as well as the efforts which have been made to improve diversity. Defendants have also tendered an expert report of an economist, Dr. Joan G. Haworth, which evaluates Dr. Madden's expert report and offers additional statistical analyses which support Defendants' position that they do not discriminate. Defendants also offer the report of Ronald R. Sims, Ph.D., a professor of organizational behavior and human resources, which criticizes and responds on a point-by-point

(Continued on following page)

Overall, Plaintiffs' evidence breaks down into a number of substantive categories: statistical evidence and expert testimony regarding discrimination in promotions and compensation, "hostile environment" evidence concerning racial jokes and nooses found at GPC's facilities, evidence of individual African-American employees' experiences with efforts to obtain promotions and increased compensation and their belief that they have been discriminated against; evidence that Defendants' promotions and compensation policies include aspects of subjectivity or discretion which can mask discrimination; and evidence that past racial inequities known to Defendants' management have not been corrected. Each will be discussed and evaluated in turn, beginning on page 37, *infra*.

VII. LEGAL STANDARDS

Plaintiffs seek to have the class certified under Rule 23 of the Federal Rules of Civil Procedure, which provides in relevant part:

> (a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable; (2)there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

---

basis to the opinions expressed by Plaintiffs' expert witness Dr. Murphy.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The burden of establishing the specific prerequisites to a Rule 23 action falls on those seeking certification. *Hudson v. Delta Airlines, Inc.*, 90 F.3d 451, 456 (11th Cir. 1996); *Gilchrist v. Bolger*, 733 F.2d 1551, 1556 (11th Cir. 1984). The Court must be satisfied, after a "rigorous analysis," that the requirements of Rule 23(a) have been fulfilled. *Coon v. Georgia Pacific Corp.*, 829 F.2d 1563, 1566 (11th Cir. 1987).

1. Rule 23(a)

A. Numerosity

The SHIPS database information produced by Defendant TSC establishes that the proposed class encompasses over 2400 people, a number well in excess of the number needed to satisfy the numerosity requirement. *See Cox v. American Cast Iron Pipe Company, Corp.*, 784 F.2d 1546, 1553 (11th Cir. 1986) ("more than forty" adequate to satisfy numerosity requirement). Defendants do not contest this.

B. Commonality and Typicality under Rule 23(a)(2-3)

Plaintiffs contend that there are questions of law and fact common to the class and that the claims of the Plaintiffs are typical of the class members so as to warrant designating them as representatives of all of Defendants' African-American employees from July 1998 to the present, and in the future as well.

Defendants emphasize that "the countless individualized inquiries necessary to adjudicate the purported class-wide claims overwhelm any cohesiveness and render collective treatment completely inappropriate." (Defendants' Brief, p. 31).

The commonality requirement does not require that all questions of fact and law raised in the action be common. However, "the claims actually litigated in the suit must simply be those fairly represented by the named plaintiffs." *Cox, supra,* 784 F.2d at 1557. An analysis of typicality is similar to commonality, but there is a stronger focus on the representative named plaintiffs. *See Prado-Steinman ex rel.*

Prado v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000) ("commonality refers to the group characteristics of the class as a whole and typicality refers to the individual characteristics of the named plaintiff in relation to the class").

There is an interrelationship between the Rule 23 requirements of commonality, typicality, and adequacy of representation:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.

General Telephone Company of the Southwest v. Falcon, 457 U.S. 147, 157 n.13, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982)

Thus, sections 23(a)(2) and (a)(3) are calculated to ensure that regardless of whether the class representatives and all class members win and the opposing party loses, or alternatively if the class representatives and class members lose and the opposing party wins, all who are affected on both sides will have had a fair opportunity to have their claims or defenses heard and determined on the merits.

While it is relatively simple to evaluate the merits of a dispute involving one plaintiff and one defendant, fairness to both sides in a class action is a far greater challenge and places considerable responsibility on the Court. If a class representative with a weak case loses and individual class members with strong cases are bound by the negative outcome, an injustice will have occurred. Similarly, if a winning class representative's claim and the class member claims are dissimilar, it may be unjust for the opposing party (usually the Defendant) to be responsible for the claims of class members. The Court's responsibility is to make sure that the common bond between the class representatives' claims and those of the class is strong enough so that it is fair for the fortunes of the class members to rise or fall with the fortunes of the class representatives. That is the very purpose of Rule 23(a).

Plaintiffs argue that common factual and legal issues exist which would be significantly dispositive of the issue of liability as to all class members. They argue that their evidence is strong enough to establish a presumption or pattern and practice of discrimination common to all class members as well as themselves. Plaintiffs specifically argue that the evidence of Defendants' promotion and compensation practices (*e.g.*, use of subjective criteria for promotions, non-posting of some job openings) coupled with the expert testimony of Dr. Madden and that of Dr. Murphy proves that Defendants' personnel and compensation practices as a whole have adversely impacted all African-Americans in the class. They also argue that when the statistical evidence is coupled with evidence of numerous acts and statements of racial hostility within the Defendant companies, plus evidence that many African-American employees have not received deserved promotions, a "pattern

and practice" of racial discrimination is revealed which is common to all Named Plaintiffs and class members.

Defendants argue that the statistical, anecdotal and other evidence is insufficient in quantity and quality to raise a presumption of discrimination or to show a pattern and practice of discrimination common to all class members. Defendants argue that the statistical proof is seriously flawed in numerous respects.

Plaintiffs seek to proceed under two different substantive theories recognized by the law in discrimination cases: disparate treatment and disparate impact. A plaintiff generally establishes disparate treatment by showing that the employer intentionally treated him less favorably than similarly-situated white employees because of his race. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983). A three part inquiry established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), requires the plaintiff to prove his qualification for a denied promotion which went to a nonmember of a protected class; the defendant employer must state a nondiscriminatory reason why the plaintiff was not chosen. Plaintiff must then establish that the Defendant's stated reason is a pretext for discrimination. Obviously, this is a fact-intensive process which focuses on the facts surrounding a particular plaintiff's claims. To obtain certification of a class in so-called disparate treatment cases, the plaintiffs must show not merely that they individually were subjected to discriminatory ("disparate") treatment; they must show that "racial discrimination was the [company's] standard operating procedure – the regular rather than the unusual practice." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324,

336, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977). This type of case is called a "pattern and practice" case. Plaintiffs contend that their statistical and other evidence meets this standard.

Under the so-called disparate impact theory, Plaintiffs must show that a facially neutral requirement or policy of Defendant's disproportionately and adversely affects members of a protected group. Where this showing is made, the employer then has the burden of demonstrating the necessity for and job-relatedness of the criterion in question. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975). A classic disparate impact case would be presented, for example, where an employer has minimum height and weight requirements which disproportionately exclude women, *See Dothard v. Rawlinson*, 433 U.S. 321, 331-4, 53 L. Ed. 2d 786, 97 S. Ct. 2720 (1977) (disparate impact found for height and weight requirements for prison guards). Again, Plaintiffs contend the statistical evidence shows that African-American employees have been disproportionately disadvantaged by the collective whole of Defendants' personnel policies.

1. Typicality

The Court will first address the issue of typicality. Plaintiffs have made little effort to show what facts prove this requirement. While the complaint does detail the profiles of each of the Named Plaintiffs, Plaintiffs have not attempted to relate the profiles to those of the class or different segments of the class. Rather, Plaintiffs emphasize the fact that all claims share common legal theories

and that a "pattern and practice" of discrimination affects all class members.

The Court is unconvinced that Plaintiffs Edwards, S.J. Harris and P. Harris have claims typical of those of the class. Edwards' claims uniquely involve the factual issues surrounding his disability; P. Harris voluntarily resigned and has asserted no timely promotions claims of substance[23] and S.J. Harris was involuntarily terminated at approximately the time this litigation began for an alleged incident which occurred when she was already on disciplinary probation. While each of these Plaintiffs may ultimately have one or more meritorious claims, their claims involve idiosyncratic features, raising questions concerning their ability to represent absent class members. Plaintiffs have the burden of showing typicality, and have failed to make an adequate showing as to these Plaintiffs.

With respect to Named Plaintiffs Cooper, Green, McCullers and Wilson, the Court is unconvinced that they have claims typical of the class as a whole. No factual showing has been made in this regard.

Turning to the question whether individual Named Plaintiffs may have claims typical of some subgroup, Plaintiff Cooper's position (lineman) is covered by the CBA, a characteristic shared by a large number of potential class members. Plaintiffs' complaint specifically states that only 5 of 150 foremen (3.3%) at GPC are African-American, even though large numbers of African-Americans such as Cooper hold lineman jobs, the "feeder

[23] Harris claimed to have applied for some type of liaison position in April 1999, but could not identify the position.

pool" for this position. Plaintiffs' theory appears to be that GPC is using a written test, the first line supervisor test, to improperly hold African-Americans back from foreman. Plaintiffs seem to assert that seniority, not the ability to pass the test, should govern these promotions or alternatively that the test is not valid. However, Cooper has never taken the first line supervisor test, and has not applied for a foreman position in recent years. Cooper's claim, as expressed in the Complaint, is that he was wrongfully denied a trainer position at GPC's Klondike Training Center. This is a non-bargaining unit position for which there were competitive interviews. The Court finds that Cooper's claim for discriminatory denial of promotion from a position covered by the CBA to an exempt position is typical of those of other covered employees who seek similar promotions. However, Cooper's claim is not typical of those covered employees who seek the positions of crew leader or foreman.

Based on the information provided, the Court is not convinced that Plaintiffs Green and Wilson, who are exempt non-management employees, have claims typical of those absent class members who aspire to Defendants' top management as described in paragraphs 34, 35, 36 and 38 of Plaintiffs' Complaint. Wilson's position (Exempt level 2) is not close to management ranks. While Plaintiff Green did apply for a position at level 7, Defendants' management levels go from 7 to 15. Also, Green did not apply for a competitive promotion within the two year period of limitations for § 1981 claims. Green has standing to assert a compensation claim under Title VII and § 1981, but no standing to assert a promotion claim. Thus, none of the Named Plaintiffs have promotions or compensation claims

which are typical of those of management level employees at Exempt Levels 7-15.

The Court finds that Plaintiff Wilson has promotions and compensation claims typical of those of exempt non-management employees. Also, Plaintiff McCullers has compensation and progressive promotions claims typical of those of non-exempt, non-covered employees. Plaintiff Green has compensation claims typical of those of exempt non-management employees.

2. Commonality

With respect to commonality, again it seems to the Court that it is impossible to conclude that the employment experiences of the Named Plaintiffs or the specific ways in which they claim to have experienced discrimination may be fairly compared with the history or individual experiences of absent class members or that the claims of class members share discrete common features such that rulings could be fashioned to fairly adjudicate these claims as a group. It is obvious that the Defendant companies collectively have a large number of employees, with many different job classifications, different locations, different supervisors, differing modes and levels of compensation, and many skill levels. It is unlikely that proof of a particular Named Plaintiff's claim would shed light on the merits of an absent class member's claim.

Thus, it appears that whatever commonality may exist could only be a function of the alleged pattern and practice of discrimination or disparate impact of unjustified policies which affect the members of the class. Plaintiffs contend that the pattern and practice is shown by the statistical evidence, the alleged atmosphere of racial

hostility as shown by the evidence about the nooses, racial jokes, slurs and epithets and the affidavits of 111 potential class members who have related their own experiences. Plaintiffs assert that the conclusions of Dr. Madden prove that Defendants' collective policies have adversely impacted African-American employees of Defendants as to promotions and compensation. Therefore, it is important to focus on the relative strength and quality of that evidence to determine if it is strong enough to provide the element of commonality needed for class certification. The Court will first describe and evaluate the reports of Plaintiffs' experts.

a. Murphy Report

Dr. Murphy summarizes his general conclusions drawn from his examination of Plaintiffs' affidavit and deposition testimony as well as other data concerning Defendants which was provided to him by Plaintiffs. The report concludes that Defendants have adopted "policies aimed at preventing or minimizing the likelihood of discrimination," but that managers and supervisors have "discretion to ignore these policies and use criteria that are not job related." (Murphy Report, p. 2). The report also makes general conclusions such as "there is little indication that [managers or supervisors] have the information, training, support or oversight that would allow and require them to make employment decisions on the basis of criteria that is job related." *Id.* at 8. This conclusion was based on the fact that Dr. Murphy was unable to find among the documents which he reviewed an "indication of any mandatory program to train managers or even to assist them in making decisions about job-posting, hiring, promotion, and compensation in a way that will be job-related and

that will avoid discrimination against black employees." *Id.* Essentially, Dr. Murphy's report is a summary of Plaintiffs' evidence which is used in support of their motion for class certification, together with his own opinion of what impact these Defendant policies, or lack of policies, might have had on African-Americans. As such, it has no usefulness as an expert report.[24]

b. Madden Report

Dr. Janice Madden obtained raw data concerning each of Defendants' employees from Defendants' SHIPS system, a computerized personnel database used by all of the Defendants. After organizing and evaluating the data provided, Dr. Madden reached conclusions which Plaintiffs argue support their claim that Defendants' collective decisionmaking processes which determine promotions and compensation have disproportionately and adversely affected African-American employees. Defendants on the other hand claim that Madden's analyses and computations are invalid or of limited value for a variety of reasons.

Madden's written reports dated March 27 and June 12, 2001, entitled "Evaluating Whether Employment Practices at Southern Company Are Racially Neutral"

[24] For the same reason, Dr. Sims' rejoinder to Dr. Murphy's report is of little assistance in determining the facts or in determining whether Defendants support a pattern and practice of discrimination or have invalid policies which have a disparate impact on African-American employees. Also, neither Dr. Murphy nor Dr. Sims is an expert on Defendants' businesses. They both make wide-ranging assertions and conclusions based entirely on a set of documents provided for their review. Both point out what "could happen" under Defendants' policies.

(hereinafter "report") have been reviewed by the Court. The report concludes that African-American employees within the Defendant companies received 14.3% fewer promotions than would be indicated by their numerical representation in the workforce from December 31, 1996 through December 11, 1999. It also concludes that for the years 1995-1999 combined the correlation between race (African-American) and odds of promotion, controlling for the factors of salary grade, subsidiary, tenure with Defendants, time since completing schooling, level of education and initial job function[25] is a correlation of minus .3836 with a Z value of 6.87.[26]

Using the same control factors, Madden determined that the estimated percentage differences in compensation between all white and black employees (excepting union employees) were as follows in each of the indicated years:

1995	3.28%
1996	2.83%
1997	2.95%
1998	2.76%
1999	2.11%

[25] Initial job function is defined as job function as of 1995, if hired before then, and at time of hiring if hired after 1995. Job function does not mean job title. Defendants' SHIPS database contains codes for twenty-two "job functions" such as Administration, Operation, Generation, Marketing, and Customer Services. Neither does job function refer to a particular department.

[26] A Z value of 6.87 means it is very unlikely that the correlation occurred by chance. The higher the Z value, the greater the unlikelihood.

The percentages were found highly unlikely to be the function of chance.[27]

In analyzing promotions, Madden first constructed "pools"[28] of employees for the purpose of determining whether African-Americans in each pool received a proportionate share of promotions based on the ratio of African-American employees to total employees in that particular pool.

The report states that 288 employee "pools" were constructed. Within each of the Defendant companies (not including Southern which has no employees) she constructed pools or lists of employees within each salary grade[29] for each calendar year from 1996 through 1999. She used year-end data in each calendar year. By comparing the identity of the employees in the pools from year to year, she was able to identify those employees who had received promotions during the past calendar year. In Madden's study the term "promotion" meant (1) receiving an increase in salary grade, (2) moving from a non-exempt to an exempt position, or (3) moving out of a union job into a nonunion job with a higher annual rate of pay. She was able to identify the promoted and the non-promoted employees by race. In this manner, she determined the

---

[27] The relevant Z values ranged from 7.75 (1995) to 3.83 (1999).

[28] The report states this is a "multiple pools test."

[29] The salary grade system at all of the Defendant companies is the same although different jobs carry different ranges of salary grade. For example, a particular job opening might announce that the position is in Grades 3-5. The successful applicant could be offered compensation within Grades 3, 4 or 5. Plaintiffs believe this is one of the mechanisms used to discriminate against African-Americans.

percentage of promotions which had gone to African-American employees in individual pools in each year.

Madden then determined the numerical extent to which promotions of African-American employees either exceeded or fell below that projected by their proportionate representation within each pool for each year. She then added the positive and negative numbers yielded by the foregoing analysis of all of the individual pools, and determined that while African-American employees received a total of 531 promotions in 1996-1999, their numerical presence within the total employee population yielded an expected number of 607 promotions. Thus, Madden determined that promotions for African-American employees fell short by 76 during 1996-1999, a percentage shortfall of 14.3%. A further calculation determined a probability of less than 3 in 100,000 that this result is due to chance.[30]

As a second step in analyzing promotions, Dr. Madden performed another statistical analysis[31] to determine the degree of correlation between race and odds of promotion. To do this she analyzed the promotions given to African-Americans and Caucasians in Defendants' workforce combined, using the following controls: (1) the salary grade of each employee, (2) the employer (GPC, SCS or SCES), (3) the employee's experience and (4) the employee's education. "Experience" for this purpose was defined as the amount of time a particular employee had

---

[30] Madden used the "multiple pools exact test", a generalization of Fisher's Exact Test, to make this determination. *See* March 27 Madden report, p. 5.

[31] A logistic regression test.

spent in the work force after finishing formal education, as well as the amount of time an employee had worked for one or more of the Defendant companies.[32]

As to education, Madden classified employees according to 13 educational levels: unknown, less than high school, GED, high school diploma, training certificate, more than high school, little college, associate degree, some college, bachelors degree, some graduate school, masters degree, and professional degree.

As previously stated, Madden found some negative correlation (minus .38) between race (African-American) and odds of promotion.

In order to measure the relationship between race and salary at the Defendant companies for each of the years 1995-1999, Madden did the following: She first determined that in each of these years African-American employees within each salary grade at each subsidiary company made less than other employees. Union employees were omitted from these calculations.[33] She also performed calculations utilizing additional variables (subsidiary interactions,[34] salary grade, job function, experience, and education) in different combinations.[35] As previously

---

[32] Apparently these two components of "experience" were treated as two separate variables.

[33] It appears that Plaintiffs are not asserting discriminatory compensation within the covered, or union, workforce.

[34] It is unclear what is meant by "subsidiary interactions".

[35] This calculation is a multiple regression analysis. Multiple regression analysis is a quantitative method of estimating the effects of different variables on some variable of interest. In multiple regression, one first specifies the major variables that are believed to influence the dependent variable. There inevitably remain minor influences, each one

(Continued on following page)

stated, this calculation showed that the wage gap between white and black employees was between 3.28% and 2.11% depending on the year.

After reviewing Madden's report, Haworth's report which criticizes Madden's report, and the arguments of the parties, the Court concludes that while Madden's methodologies may be valid, the analysis has some limitations which undermine its usefulness in measuring whether Defendants' employment practices are racially neutral. Primarily, this is caused by the failure to adequately measure the promotion and compensation experiences of similarly situated employees. Most importantly, Madden identified "experience" as one factor which has a bearing on promotions and compensation level, obviously a critical variable. However, under Madden's definition "experience" meant only (1) the amount of time which had elapsed since the individual's finishing formal education and (2) the amount of time the individual had been on Defendants' payroll. There was no consideration of such factors as type or level of acquired skills, both of which are highly related to promotions and level of compensation. Neither was there any effort to compare employees with equivalent work experience in specific job categories or job progressions. Admittedly, it would be very difficult to factor those

---

perhaps very small, but creating in combination a non-negligible effect. These minor influences are treated by placing them in what is called a random disturbance term and assuming that their joint effect is not systematically related to the effects of the major variables being investigated – in other words by treating their effects as due to chance. The relationship between the dependent variable and the independent variable of interest is then estimated by extracting the effects of the other major variables. Fisher, Multiple Regression in Legal Proceedings, 80 Colum.L.Rev. 702, 705-06 (1980) (footnotes omitted).

considerations into a statistical analysis such as the one Madden performed; however, their omission is relevant in determining how much confidence to place in her conclusions.

Also, Madden did not compare outcomes for those employees, both black and white, who had actually applied for posted positions. Because Defendants maintain an automated application process for all competitive promotions for nonexempt and exempt positions, this comparison is not difficult.

In determining whether or not a given employee had had a promotion, Madden did not distinguish between so-called progressive promotions (which do not involve a job vacancy but rather moving the employee to a higher salary and title within a job family) and competitive promotions. Some progressive promotions occur within a given salary grade; these in-grade progressive promotions apparently were omitted entirely from Madden's study. This appears to be a flaw. Defendants also argue that it is improper to lump progressive promotions and competitive promotions together; however, this argument is rejected because both types of promotions involve evaluative choices by management.

Defendants object to Madden's definition of "education" because it fails to take into account field of study. Defendants point out that at their higher salary grade levels, large percentages of managers possess engineering degrees, whereas within the African-American population at large as well as within the Defendant companies, African-Americans do not tend to hold engineering degrees as compared with degrees in other fields of study. The Court believes that the Defendants have a valid point,

insofar as Madden's conclusions are directed toward the higher levels of management; however, as to employees at level 6 and below, Madden's definition of education is fully adequate for the purpose chosen.

Dr. Haworth's report is particularly critical of Dr. Madden's analysis of promotions for failing to model the analysis to the decisionmaking process actually used by Defendants. Haworth points out that there are typical lines of promotion within departments and job families which were not considered by Madden. Haworth's point has merit;[36] Madden did not compare similarly situated individuals.

In seeking to show that Defendants' promotions and compensation policies are racially neutral, Defendants rely on Dr. Haworth's report which concludes there is no reliable evidence that there is any difference in treatment as between whites and blacks. Haworth analyzed the issue of effect of race on salary and promotion by using more variables and by comparing the experiences of more similarly situated individuals. Haworth's analysis revealed that there were small gaps between the promotions rate for African-Americans versus Caucasians, as well as small salary gaps; however, she determined that these gaps were not statistically meaningful. Madden in turn replied, in her June 12 report, that the lack of statistical significance was due to the fact that Haworth had "carved up" the employees into pools[37] so small that it would be

---

[36] In Madden's June 12 report she added job function as a control; however, she used only 22 job functions for all employees. She did not consider normal lines of progression; apparently, Madden did not have data needed for this purpose.

[37] Dr. Haworth also used the multiple pools analysis.

unlikely that the results would be statistically significant. The Court believes there is some truth in this. The Court also notes that Haworth's analysis did not include the so-called "developmental moves" in her analysis of promotions. Neither has either side offered evidence concerning what percentages of promotions occur through developmental moves. This is a factor limiting the usefulness of Haworth's report to the extent it is intended to prove that Defendants' treatment of African-Americans is the same. After reviewing both reports, as well as other information in the record, the Court is left with the impression that there could be some salary gap and promotions gap between African-American and white employees working for the Defendants, although it is impossible to determine what the gaps are, whether they are statistically significant, or whether factors other than race are involved.

Defendants have pointed out that of the 148 "pools" of employees identified by Madden for the years 1998-1999, only three pools showed a representational deficiency of African-American promotions: two union salary grade pools and one pool for non-exempt salary grade 5 employees. While this may not undercut the validity of the method Dr. Madden used, it may be evidence that promotional inequity affecting African-American employees (defining inequity as lack of at least proportionate representation in the promoted pool) exists only in segments of the workforce.

Based on the foregoing analysis of the expert testimony offered by the parties, the court concludes there has been an inadequate showing by Plaintiffs to raise a presumption of discrimination arising from application of the collective whole of Defendants' compensation and promotion policies. Thus, disparate impact analysis produces no

evidence common to the claims of all class members. Also, the expert testimony fails to establish evidence of a pattern and practice of discrimination.

c. Noose Evidence

In further support of their argument on the issue of commonality, Plaintiffs cite the existence of various nooses at various GPC locations which establish the existence of an atmosphere of hostility common to the class as a whole. The evidence on this point is as follows.

This case was filed on July 27, 2000. The original complaint contained the following allegation:

> from 1997 through 1999 Defendants permitted a hangman's noose to be hung in a heavily traveled area of Georgia Power's operating headquarters at Cornelia [GA]. Although a hangman's noose has long been one of the most chilling representations of racial harassment, two Georgia Power Vice-Presidents and several managers who were aware of and had even viewed the nooses took no action to remove it. Rather, they allowed it to hang for nearly two years.

Within a few days after the lawsuit was filed GPC undertook an investigation into the Complaint's allegations. This included site investigation of numerous company premises in various locations regarding conduct which might be intimidating or offensive to African-American employees. The investigation did reveal a number of arguable "nooses" hanging or lying in various locations where rope is available for use by GPC's employees. The investigators took statements from employees at those locations to determine what explanation existed and

whether the surrounding circumstances suggested an intent to intimidate African-American employees. Photographs were taken and the nooses were removed.

Defendants' investigative memoranda, which are voluminous, are in the record as Plaintiffs' Exhibit 5 to the motion for class certification and have been reviewed by the Court. A photograph of the alleged noose referred to in the Complaint is attached as Exhibit A to the Complaint; other alleged nooses appear in photographs marked as Exhibit 5 of the Appendix filed in support of Plaintiffs' motion for class certification.

Regarding the nooses, the Court notes that GPC's covered employees use rope constantly in their work. In fact, knot tying is a skill taught at GPC's Klondike Training Center. Rope is supplied at GPC's plants and operating centers. Therefore, the fact that rope or knotted rope is found hanging or lying in a GPC facility is itself a fact of no consequence. The important focus is whether, contextually, knotted rope was used or displayed in a manner intended to demean or intimidate African-Americans.

After reviewing Plaintiffs' exhibits, particularly Exhibit 5 and the affidavits of those absent class members who had observed a "noose" on GPC premises, it does appear that at numerous times at various locations knotted rope was present which resembled a noose. These "nooses" did offend and intimidate some employees, who attributed a racial significance to the nooses. The sworn statements of Defendants' employees, on the other hand, disavowed any knowledge of racial meaning or racial animus.

The evidence shows generally that various alleged "nooses" were found in GPC's investigation which had

been in existence, uncommented-upon by either white or black employees, for long periods of time. In the affidavits of prospective class members presented by Plaintiffs, some affiants commented that they had seen nooses which reminded them of lynchings of blacks in the old South. However, very few of them said that they had pointed this out to management, or for that matter even to other employees. In only two instances did they say that anyone had made any verbal remarks relating the noose to a lynching.

The two incidents in which a Georgia Power supervisor made such a comment about a noose are described as follows. The first reference is in a statement of an employee.

> While working at Georgia Power, I have been subjected to unequal terms and conditions of employment, including being subjected to a racially hostile work environment. For example, while I was working in Dalton, some white employees and I were taking a break and showing each other knots. One white employee, John Armstrong, showed us how to tie a hangman's noose. After telling us the number of loops the knot had to have in order to be legal for executions, he pointed to me and said, "Pete, you probably wouldn't need six loops." I found this comment highly offensive and degrading. He did not make any such remark to any of the white employees. The noose was then hung in the storeroom, and every time through 1988 that my position brought me back to Dalton, I saw it hanging there. None of the other knots was hung in the storeroom.

(Affidavit of Lavern E. Anderson, P 11).

GPC found a noose at its Dalton facility on August 4, 2000 which was hanging "from a metal bar on a rack in the common area of the storeroom." (Plaintiffs Exh. 5, p. 2269).[38] This appears to be the same noose identified in the affidavit of Lavern Anderson. Ralph Magnifier, a white crew leader at the Dalton facility, believed that the noose had been present for ten years. "He did not see the noose as being offensive and had not seen any other symbols that may be considered offensive." *Id.* at 2270.

The other incident occurred at Plant McDonough in 1994 and was recounted by GPC's white male supervisor as follows:

> I went into the control room [at Plant McDonough] to visit the two operators on duty and while in the area found a short length of rope (about six feet). While chatting with the men in the control room, I tied the rope into a hangman's noose, something I learned to do as a kid, being infatuated with Westerns on T.V.
>
> Royce Brown walked into the control room and in my casual nature with my employees, there were comments made in jest about the rope. Mr. Brown left the area and I untied the rope and left it in the area when I departed.
>
> Someone (unknown) contacted me to let me know that [Mr. Brown] was upset about events that occurred in the control room. I recognized that I had made a mistake with one of my employees and made plans to find [Mr. Brown]. I located him on the plant site, within an hour, and made

[38] This page number refers to the sequential confidentiality number located on each successive page of Plaintiffs' exhibits.

> a sincere apology for anything that I might have done in the control room to offend him.

(Plaintiffs' Exh. 5, p. 2104).

Other findings in GPC's investigation were as follows:

Two nooses were found at Defendant GPC's Cornelia facility, one in a storeroom and one in the office of Ken Kirby. In his statement, Kirby stated that he "hung the skeleton/noose on a door several years ago with a no smoking sign attached to it. It was at a time before smoking was prohibited in [GPC] buildings." (Plaintiffs' Exh. 5, p. 2136). With respect to the noose found in the storeroom, George Chapman stated that "he thinks someone dabbling with rope probably made it one rainy day. He doesn't know who made it or hung it up. He doesn't know of any problems at [Cornelia] of an employee, racial, or discriminatory nature." *Id.* at 2134. Christina Hodges, an African-American customer service representative working at Cornelia, stated that she "never saw a noose until she saw the picture in the paper. She knows of no problems at [Cornelia]." *Id.* at 2135.

Another "noose" was found by GPC at its Athens facility and was removed by management. (Plaintiffs' Exh. 5, p. 2121). During the investigation, GPC investigator Norman Holle stated that if the noose had not been pointed out to him, "he probably would have never seen it." The noose was located at the top of an 18' garage door used by large trucks. Three statements were given with respect to this matter. The first statement merely acknowledged the presence of the noose. (Statement of [unidentifiable] Holle; Plaintiffs' Exh. 5, p. 2127). The second statement, provided by Luther Standridge (race not noted) states:

> I came to work for Georgia Power in February 1985. I was trained to dielectric test trucks shortly afterwards. The noose was hanging within clear view of where we sat to run the test machine. It was there before I came to work for Georgia Power. I never considered it to be anything racial. I tested trucks with men both black and white and I never heard a comment made about it. I would associate a noose with the old west rather than something racial.

(Plaintiffs' Exh. 5, p. 2128).

The third statement with respect to the Athens noose, provided by Al McKeever (African-American), states:

> I, Al McKeever, am a mechanic at the Athens Fleet Services Garage. I have been in the garage for approximately 30 years. I don't know who put the noose on the rail nor do I know exactly when it was put up. It has been there for approximately fifteen years or longer. The noose never bothered me. Since the lawsuit in 72-73 about discrimination, I have not been threatened, harassed, or intimidated in any way.

(Plaintiffs' Exh. 5, p. 2129).

On August 18, 2000, Dwight E. Stevens conducted an investigation at GPC's Milledgeville Operating Headquarters and found a training rescue mannequin laying in a storeroom which had a 3/8" polyester rope tied around its neck. (Plaintiffs' Exh. 5, p. 2239). The mannequin is not identifiable as being of a particular race. Paul Morgan, an African-American truck operator working at the Milledgeville facility, stated in his investigative interview that "he had not seen the noose and therefore, was not offended by it. He only saw the end of the rope hanging from the

dummy and did not know what the rope terminated into." *Id.* at 2242. Another employee at the Milledgeville facility, J.D. Parker, an African-American employee, provided the following statement regarding the noose:

> I have seen the dummy hanging up at the shed with a noose around its neck. I think it was done as a joke because of how heavy it is. It was not done because of race. I have heard that Paul and Jim [unidentified] did it, but I did not see them do it. If you ask me if they did it I would have to say that I think they did but do not know for sure that they did. That thing sure is heavy and needs to go on a diet.

(Plaintiffs' Exh. 5, p. 2261).

GPC also found two possible nooses at its Forest Park location in its investigation. In the first instance, Dan Fleming, a white male, reported a rope tied to a fan in his work area. "Fleming states that this rope had been tied to this fan for, at least, the past six years, during which period he has worked in this area. Fleming told his supervisor, Mark Sanders, about the rope, as a direct result of the heightened issues affecting diversity, and, subsequently Sanders removed the rope." (Plaintiffs' Exh. 5, p. 2175).

The other possible noose was found on the tool box of Preston Owings. Owings stated that "the rope in question, was not noose, but a small piece of nylon rope, knotted twice with a half hitch knot, and used to life [sic] the end bell of a motor housing, as work conditions required." (Plaintiffs' Exh. 5, p. 2176) (emphasis in original).

Another GPC investigative memo describes an incident in which two employees engaged in "racially insensitive horseplay"

> "[a] horseplay incident was conceived by Eddie Dean, a white employee and Brian Hill, a black employee to, apparently cause emotional distress to Richard Mitchell, a white employee. The issue concerned a mock racial incident involving a ten year old safety pamphlet, from Dean's toolbox, entitled Facts about Backs which had been changed to read Facts About Blacks. Specifically, Hill pretended to be highly upset at the apparent racial monogram, while Dean appeared to be totally insensitive to Hill's concerns. This charade was carried out over most of a day's work on or around July 5, or 6, 2000.

(Plaintiffs' Exh. 5, p. 2176) (emphasis in original).

Another statement describes the discovery of "some type of voodoo doll that was hanging from a hangman's noose" in the office of Mr. Buddy Phillips, a Caucasian supervisor at the Klondike Training Center. With respect to this "noose," Phillips explained that:

> For his 40th birthday, his children, Marc & Katie, gave him an "old timers doll." He described the doll as being approximately 12" high, W/M, grey hair sticking out from under a little hat, with a red shirt with writing on it pertaining to getting old. Phillips stated that he took the doll to work with him and put it in his office at the South Atlanta Road TMC. During the time frame 93/94, he came to his office one morning and found the doll hanging from his Venetian blinds by a hangman's noose. He just left it there as he felt that his crews were just trying to get a "rise"

> out of him. He in no way felt concerned or threatened by the noose. Phillips stated that the whole time the doll was hanging on the blinds, that no one ever made a comment about it.

(Plaintiffs' Exh. 5, p. 2113).

On July 30, 2000, a knotted rope resembling a noose was found lying on the floor in a corner at Plant Scherer. Another rope, with a loop attached to a pole was found nearby. Statements were taken from employees who felt that the nooses were tied by "copycats" after news of the instant lawsuit was announced. (Plaintiffs' Exh. 5, pp. 2036). In fact, several individuals alleged that Chuck Quick (a white switch man sampler working for Defendant GPC at Plant Scherer) had stated that "if you really want to get things stirred up, you should place a noose somewhere." (Statements of Kathy Russell, Nathaniel Walkers, Jeff Manuel; Plaintiffs Exh. 5). Julius Seawick, a security officer at Plant Scherer stated "I think [the noose] was a copy cat act because of the recent activities in one of [Defendant GPC's] northern facilities." (Plaintiffs' Exh. 5, p. 2049).

After the "nooses" were found in Defendant GPC's Plant Scherer Facility, a memorandum was sent to all employees at the plant which stated, in part:

> Our company policy concerning conduct states "all employees and agents of the company are expected to conduct themselves in a manner consistent with professionalism, decency, dignity, and respect."
>
> Our company policy further states with regard to workplace violence that "acts or threats of physical violence including intimidation, harassment,

> and/or coercion, which involve or affect the company or which occur on company property, will not be tolerated."
>
> As an example, the production and displaying of a hangman's noose is inconsistent with our policy on conduct and our policy on workplace violence. Any employee engaging in such an act will be subject to discipline up to and including termination.

(Plaintiffs' Exh. 5, p. 2063).

Summarizing the noose testimony, the Court finds that it is impossible to say whether any of the nooses were made or displayed out of a desire to offend or intimidate African-American employees. Some of the individuals who made the nooses or were aware of their presence probably knew of the potential for offending or perhaps intimidating African-American employees and perhaps some were insensitive or even callous to this fact. Others, however, probably never even thought of a racial implication. Taking their statements at face value, some African-Americans were offended or intimidated; others did not think of a racial implication. There is no evidence that any of the Named Plaintiffs were exposed to incidents similar to these.

d. Racial Slurs and Jokes

In 111 affidavits of prospective class members, information is provided as to various racial slurs, epithets, jokes, and harassment. Some of these instances are detailed in the brief filed in support of Plaintiffs' motion for class certification at pages 9-10, footnote 5. Almost all

of the 111 affidavits contain some mention of a racist comment.

Defendants do not seek to disprove that the statements were made but point out that within the Defendants' companies there exist working environments at 200 plus locations, such that the affidavits are insufficient to establish the existence of "severe and pervasive conduct that is both subjectively and objectively offensive" as required to establish the existence of a hostile work environment. Defendants also point out that the Named Plaintiffs themselves have experienced little of the conduct or statements referenced in the affidavits, thus undercutting the suggestion that the jokes and slurs represent pervasive conduct. Defendants also point out that they do have channels through which employees can report instances of harassment; also, Defendants point out that their management did respond when the lawsuit was filed.

The Court has reviewed all of the affidavits, and does agree with the Plaintiffs that the statements and conduct referenced therein are unacceptable and that they are demeaning to African-Americans. However, the Defendants are correct that in terms of sheer numbers, given the size of the Defendants' workforce (over 12,000 employees) and the large number of work locations maintained by Defendants, the instances of racial slurs, epithets, jokes and harassment set out in the affidavits are insufficient to warrant an inference of the existence of a hostile environment common to all locations maintained by all Defendants.[39]

---

[39] Plaintiffs note in their reply brief, p. 6, n. 4, that they are not seeking certification of a hostile work environment claim. However,

(Continued on following page)

For the same reason, the noose evidence and evidence of racial slurs, jokes[40] and epithets set out in the affidavits are inadequate to establish the existence of a pattern and practice of discrimination.

e. Glass Ceiling

In a further effort to show that the Named Plaintiffs and members of the class share common issues, Plaintiffs argue that the Defendants maintain an "upper glass ceiling" and a "lower glass ceiling" which produce significantly smaller representation of African-Americans in lower, middle and upper management than exists at non-management levels. Defendants do not appear to contest the figures cited in Plaintiffs' brief.

The data provided by Plaintiffs concerning lower representation of African-Americans in management would be relevant to show the effect of discrimination if discrimination in promotions were shown at the management level. This data does not in itself show an intent to discriminate. Also, as previously mentioned, there is no Named Plaintiff who can represent management level employees in promotion or compensation claims.

---

they point out, correctly, that the Court can consider this evidence to determine the existence of a pattern and practice of discrimination.

[40] Plaintiffs' Exhibit 6 is a sheet containing a large number of racist jokes. The Court has been unable to determine which of Defendants' locations it came from or which employees saw it. Similarly, the cartoon marked as Plaintiffs' Exhibit 7 (hooded KKK figures singing "I'm Dreaming of a White Christmas") is not identified as to which location was involved or which employees saw the cartoon.

f. Alleged Policy of Ignoring Policies

Plaintiffs argue that while the Defendants have numerous, detailed written policies and procedures pertaining to filling job vacancies, making promotions, and determining compensation levels, the Defendants' actual policy is "no policy". Plaintiffs base this argument primarily on statements made in a deposition by Mark Wolfe, staffing director for SCS. Wolfe testified that SCS promulgated guidelines for GPC, SCS and SCES hiring managers to use. However, he made it clear he had little information concerning the actual application of those policies in the hands of Defendant managers. Basically, he said that SCS promulgated the policies and procedures; the implementation is up to Defendants' managers. In response to various questions by Plaintiffs' counsel, he answered essentially that there was no guarantee that a particular manager would follow the recommended procedure.

Plaintiffs seek to draw too much from the statements made by Wolfe in his deposition. Wolfe did not testify that managers do ignore the policies and procedures established by SCS. Wolfe's testimony is more fairly characterized as asserting lack of knowledge. Particularly when the affidavits of Defendants' managers are considered, it is simply incorrect to say that Defendants utilize entirely subjective processes in making promotions, evaluating employees, filling vacancies, or determining compensation. *See* Defendants' Exhibits 28 through 61. It is true that in applying SCS' recommended procedures managers must make discretionary determinations; but the Court cannot see how this could be avoided. Defendants' employees are not assembly line workers. In addition, it is incorrect to suggest that because Defendants' personnel policies do not dictate a particular result in a given case, there is no

policy. A fairer interpretation of the evidence would be that Defendants do have numerous written procedures and policies regarding hiring, promotions, evaluations and compensation, that there is some variation in the manner in which various managers use these procedures, and that the policies and procedures were never intended (nor could they be) to dictate particular outcomes in individual cases. These facts do not make the decisionmaking process improperly or unfairly subjective, however.

g. Prospective Class Members' Affidavits Establishing Their Own Experiences with Defendants

Plaintiffs have filed 111 affidavits of prospective class members who recite (in addition to the noose testimony and the racial jokes and slur testimony previously discussed) their efforts to obtain promotions or greater compensation, and their belief that Defendants have discriminated against them in denying them the promotions and compensation they believe they should have.

The affidavits as a whole do establish the belief of the affiants that they have been discriminated against, but it is not possible to determine based only on the affidavits that discriminatory decisions were made in the instances recited. In order to make that determination, the Court would need considerably more detailed information as to each of the recited instances. In the Court's opinion, these affidavits serve to undercut Plaintiffs' position on the issue of commonality.

Ninety-one of the 111 affiants are current or former employees of Defendant GPC. Six individuals are or were

employed by Defendant SCES. Twelve stated that they are or were employees of Defendant SCS.

Of the 65 male affiants, 55 hold positions covered by the CBA. Among those 55, three have college degrees. Twenty-five of the 111 total affiants hold degrees from a four-year college.[41] One of the 25, Willie Mathis, holds a degree in engineering.[42]

A representative sampling of the 111 affidavits is as follows. The first three affidavits are from persons who have held or hold management positions with defendants.[43]

Angelin Maines is a former employee of Defendant SCES, where she worked as a project manager. Before her employment with Defendant SCES, Maines obtained a Bachelor of Science Degree in Marketing from American International College in Springfield, Massachusetts. Maines worked for Defendant SCES for five months. She states that "with respect to job opportunities, [Defendant] prevented me from advancing to the same levels or at the same rates as similarly situated Caucasian employees." (Maines Aff., P 3). Maines also asserts generally that she

---

[41] John Muckle, a lineman for Defendant GPC, received a Bachelors Degree in Criminal Justice from Albany State College. Greg Jackson, a security coordinator for Defendant GPC, received a B.A. in Theology from the Florida Theological Seminary. Rickey Bailey, an electrician for Defendant GPC, received a Bachelors Degree in Art from Columbus College.

[42] Mathis, a former district power marketing executive for Defendant GPC, states that he received a B.S. in Electrical Engineering, Electronics & Communications from Howard University.

[43] Mathis, Maines and Bowen are the only affiants who held or hold what appear to be "management" positions with Defendants.

"received lower compensation than similarly situated Caucasians performing the same or similar jobs." *Id.*

Therese Bowen has been employed at Defendant GPC for approximately five years. She is currently an account manager at the Customer Care Center in Henry County, Georgia. Bowen, who received an English degree from Spelman College in Atlanta, Georgia, began working for Defendant GPC as a temporary employee in 1995. Bowen's first permanent position was chief PBX operator in Atlanta, Georgia. Subsequently, she obtained the positions of secretary, worker's compensation representative, and support representative I. In August 2000, Bowen was promoted to her current position of account manager. She states that she has been unable to advance to the same levels or at the same rates as similarly situated Caucasians. Bowen alleges that two non-posted positions, in 1999 and 2000, were awarded to Caucasian employees. Bowen also alleges that she has received low performance scores and that she has been reprimanded for making personal phone calls on account of her race.

Willie Mathis was employed as a district power marketing account executive by Defendant GPC for twenty years before he was terminated in May, 1999. Before his employment with Defendant GPC, Mathis obtained a Bachelor of Science in Electrical Engineering, Electronics & Communications from Howard University in 1976. Mathis complains generally that he was treated unfairly, on the basis of race, with respect to job opportunities, compensation and performance evaluations. Mathis states that five Caucasian employees who were hired at the same time as he received promotions one year before he did. Mathis also alleges that he received lower compensation

and lower performance evaluation scores because of his race.

Mack Thomas is currently employed as a lineman for GPC in the operating line department in Carrolton, Georgia. Thomas does not describe his educational background, but states that he began working for Defendant GPC as a utilityman in 1981. In this position, his duties included performing janitorial work and aiding in groundskeeping. (Thomas Aff., P 7). Subsequently, Mack advanced as a helper in 1982, as a truck operator in 1982, and then as a lineman in 1986. Mack states that in 1999 he was twice denied a promotion to a crew leader position in the operating line department. In his affidavit, Mack also states that GPC uses a subjective performance evaluation system in which his manager "is able to inject racial bias" into the evaluation scores. (Mack Aff., P 16).

Norman Wright has been working at Defendant GPC for nineteen years and is currently working as a senior field service representative in Macon, Georgia. Wright, who does not detail his educational background, began working for Defendant in 1981 as a laborer in the opening field department. From 1981 to 1998, he advanced through the following positions: laborer, switchman sampler, laborer in the maintenance department, auxiliary equipment operator, apprentice mechanic, field service representative, helper, and senior field service representative – the position which he obtained in 1997 and currently holds. In his affidavit, Wright contends that, during his career with Defendant GPC, he has been unable to advance to the same levels or at the same rates as similarly situated Caucasians. Specifically, Wright alleges that between 1988 and 1992, he was denied a facilitator position which was awarded to Steve Martin, a white employee.

Anthony Mattox has been working at GPC for approximately sixteen years. He is currently employed as a lineman in Gwinnett County, Georgia. Although he does not describe his educational background, Mattox states that, before his employment with Defendant GPC, he worked for Country Pride and Protein Foods in Gainesville, Georgia on the clean-up crew. At GPC he has held the following positions: winch truck operator, apprentice lineman and lineman. Mattox states that Defendant GPC's subjective interview and testing policies and practices have kept him from advancing, while allowing whites to "readily advance." (Mattox Aff., P 7). Specifically, Mattox alleges that three Caucasian individuals advanced to the position of crew leader in 1995, 1998, and 2000. Additionally, Mattox contends that he has "received unfair and unequal terms and conditions of employment which have resulted in discrimination in job opportunities." *Id.* at 8. Mattox states that he "believe[s] that [his] Caucasian supervisor, Tom Smith, has unfairly disciplined [Mattox] to keep [him] from advancing within the Company." *Id.* As an example, Mattox contends that he received an oral reprimand on one occasion for making an appointment with a private doctor instead of the company doctor with respect to an on-the-job injury. Mattox contends that a Caucasian employee engaged in similar conduct, but that he was not aware of any verbal reprimand in that instance. Therefore, Mattox concludes that "because my supervisor has unfairly singled me out for disciplinary action because of my race, I have been unable to apply for positions for which I was qualified."[44] *Id.* at 9.

---

[44] Mattox makes this contention as it is Defendant GPC's policy to prohibit an employee from seeking a promotion while currently on active discipline.

Jesse Nation has been employed by Defendant GPC for approximately 22 years. He is currently employed as a lineman in Austell, Georgia. Nation, who does not detail his educational background, asserts that he has been treated unfairly with respect to job opportunities on account of his race. Nation began working for GPC in 1977 as a member of the line crew (construction & maintenance department). He then advanced as an entry level line helper, a winch truck operator, apprentice lineman, and lineman. Nation asserts that he has been denied promotions through the use of "moving goalposts." Specifically, Nation complains that the company takes other factors, such as test scores, education, and interview results, into promotion considerations other than seniority. Nation contends that if Defendant GPC used seniority as the sole determinant in awarding promotions, he would have obtained the position of foreman in 2000. Instead, Nation states that "because the Company relies on subjective interviews and tests to determine promotions to foreman positions, [he] was denied the job." (Nation Aff., P 11).

Wilhemina Pierce worked for GPC as an administrative support in the billing services department in McDonough, Georgia for approximately eighteen months. Pierce held this position until September 26, 2000 when she resigned. Pierce, who states that she is currently enrolled at Atlanta Technical College, began her employment at GPC as a collection specialist. She states she was treated unfairly with respect to training opportunities because of her race. (Pierce Aff., P 7). Pierce alleges that she was refused proper classroom training with respect to her position as timekeeper. Pierce also alleges that she was subjected to a racially hostile environment during her employment at Defendant GPC. In support of this claim,

Pierce states only that she was not afforded the opportunity to participate in meetings related to her position. (Pierce Aff., PP 11-12). No other detail is provided.

Yolanda L. Roberson is a former employee of Defendant SCS. Roberson, who holds a biology degree from Dennison University, was employed by Defendant SCS as a customer service representative for approximately 23 months. Roberson asserts that she quit her employment because "the stress of race discrimination had become too great." In her affidavit, Roberson contends that she was treated unfairly because of her race with respect to job opportunities and subjected to a racially hostile environment. In her brief employment with Defendant, Roberson alleges that she applied for the positions of technical support, billing analyst, team leader, and dealer coordinator. These positions, according to Roberson, were awarded to Caucasian employees who were less qualified than she. Roberson also alleges that she was discriminated against with respect to compensation and performance evaluations.

Anthony Hagan has been working for Defendant GPC for approximately 28 years. Hagan, who does not describe his educational background, began working for GPC as a laborer in 1972. Subsequently, he obtained the positions of helper, winch truck operator, light equipment operator, serviceman C, serviceman A, and special service representative. In December, 1991, Hagan obtained the position of Investigator I, a position which he currently holds. In his affidavit, Hagan states that, during his employment with Defendant GPC, he has been treated unfairly because of his race with respect to job opportunities. As support for this contention, Hagan states that a Caucasian co-worker was awarded the position of meter foreman for which

Hagan had previously expressed interest. Hagan maintains that this job opening was never posted.

Lillie O. Haley was employed by Defendant GPC for approximately four years before voluntarily leaving the company in December, 1998. (Haley Aff., P 2). In her affidavit, Haley states that, during her employment she "was treated unfairly because of [her] race with respect to job opportunities, compensation, and the terms and conditions of [her] employment." *Id.* at 3. Haley, who received an associate degree in accounting from the Atlanta Business College in 1977, began working for GPC in 1994 as a Teleservice Representative in the Marketing Department at the Ralph McGill office in Atlanta, Georgia. In 1996, she was transferred to a temporary full-time position as an energy advisor. In March, 1997, she was transferred to another temporary full-time position as a residential & sales field representative. After concluding that Defendant GPC would "never let [her] advance because of [her] race," Haley quit in December of 1998. *Id.* at 19. In her affidavit, Haley complains that she was not offered a permanent full-time position on the basis of her race. Haley states that when she inquired as to why she was not chosen for a specific position, her manager informed her that her lack of a certain skill or attribute was the deciding factor. Haley also states that new, permanent full-time Caucasian employees received a higher rate compensation. This discrepancy, according to Haley, was based on her race. *Id.* at 13.

Kimberly Turner was employed with Defendant SCS as a computer operator I in Atlanta, Georgia for approximately three years. Turner was fired in January, 2000. In her affidavit, Turner asserts that her termination was as a result of racial discrimination in disciplinary action.

Specifically, she states that "on January 12, 2000, I was terminated for sending an e-mail to another employee by mistake." In her affidavit, Turner states that Marcia Schultz, a Caucasian employee who engaged in similar conduct was disciplined less harshly. Turner states that Schultz allowed her boyfriend, a former employee, to use her computer. (Turner Aff., P 15). As a result Schultz was given a two week suspension. Although Turner does not describe the content of the e-mail which she was disciplined for sending, Named Plaintiff McCullers stated in her deposition testimony that Turner was fired for sending a pornographic video and/or pornographic photograph to members of upper level management and "all over, in different parts of the Company." (McCullers Depo., p. 60).

Howard Harden, III has been employed by Defendant GPC for approximately 22 years. Harden received a B.A. in Divinity from Lahario Bible Institute in Augusta, Georgia. Harden alleges that he has been treated unfairly because of his race with respect to job opportunities and been subjected to a racially hostile environment. (Harden Aff., P 3). Harden's first position at GPC was lineman helper. In 1979, Harden was promoted to the position of field service representative in Augusta, Georgia, a position which he currently holds. Harden states that he has applied for and been denied several promotions for which he was qualified. For instance, Harden applied for the position of meterman C for which he was required to take a test. Harden failed the test and the position was awarded to another individual with less seniority. *Id.* at 8. Harden also states that he has been subjected to a racially hostile environment. In support of this allegation, Harden states that Defendant GPC sued him because he lost a $30 sealing iron and required him to take a day off without

pay in order to compensate his employer for losing a piece of their equipment. Harden contends that several Caucasian co-workers have lost equipment and not been sued.

Bobby Couch is a current employee of Defendant GPC where he has been working for 27 years. Couch received a Technical Degree in Automotive Mechanics from Coosa Valley Technical School in Rome, Georgia in 1969. Couch accepted a job with Defendant GPC in 1973 as a "C" Class Mechanic at the Rome Division. In 1975, Couch obtained the position of "B" class mechanic based on his seniority. In 1982, Couch was promoted to the position of journeyman mechanic, which he currently holds. In his affidavit, Couch asserts that he has been treated unfairly because of his race with respect to job opportunities and been subjected to a racially hostile work environment. Specifically, Couch contends that he has applied for and been denied several promotions, including crew-leader, for which he feels he was qualified.

Willie Geter has worked for Defendant GPC for fifteen years. Geter, who does not disclose his educational background in his declaration, is currently employed as a fork lift driver in Newnan, Georgia. Geter asserts that he has been treated unfairly because of his race with respect to job opportunities. Geter also states that he has been subject to a racially hostile environment. (Geter Decl., P 3). From 1979 to 1989, he held the positions of laborer, meter reader, and senior meter reader. *Id.* at P 10. Geter states that, in 1993, he applied for the lead man position of senior service representatives in the meter reading department, but that the position was awarded to a Caucasian employee with less experience.

Jackie Edwards, who is currently working as a mechanic in the maintenance department in Cartersville, Georgia, has been employed by GPC for approximately thirty years. Edwards, who does not describe his educational background, asserts that he has been treated unfairly because of his race with respect to job opportunities. Edwards also states that he has been subject to a racially hostile environment. In his affidavit, Edwards contends that he has applied for and been denied promotions for which he was qualified. Specifically, Edwards states that in 1999 and 2000, he applied four separate times for promotion to the storekeeper position. "In many cases," Edwards alleges, "[Defendant GPC] awards these positions to less qualified Caucasian employees." (Edwards Aff., P 10). In support of his assertion that he has been subjected to a racially hostile environment, Edwards alleges that his co-workers have posted Confederate insignias such as the "Rebel Flag" in the workplace.

Paul Jackson has been working for Defendant GPC for approximately twenty years and is currently employed as a customer service representative at the Metro Customer Service Center in McDonough, Georgia. Jackson, who obtained an Associate degree in Business Administration from Atlanta Metropolitan College in 1979, began his career with GPC in 1980 as a customer service representative C. Six months later, he was promoted to customer service representative B. In 1980, Jackson obtained the position of customer service representative A, a position which he still holds. In his affidavit, Jackson states that he has been treated unfairly because of his race with respect to job opportunities and discipline. (Jackson Aff., P 7). Specifically, in 1998 Jackson was absent from a class which he was required to attend. As a result, he was

placed on the second level of positive discipline for his absence. However, Jackson states that, "on countless occasions," when a Caucasian employee was absent from a mandatory meeting, "the employee conducting the class would generally phone or go to that employee's work area and request that they join the meeting." *Id.* at 7. However, Jackson asserts that, because of his race, he was "not afforded a reminder that the meeting was taking place." *Id.* Because of his disciplinary record, Jackson was unable to apply for a promotion to the metro customer service expert group. Jackson also maintains, without citing a specific example, that he has received unfairly low performance evaluation scores because of his race. *Id.* at 9.

Summarizing, 111 prospective class members have filed affidavits which evidence their belief that Defendants have treated them unfairly on account of their race. Because the Court has no other information concerning the details of these complaints, it is not possible to even estimate whether all, some or none of the affiants' complaints are valid. The Court does observe that while most of the allegations are rather general, resolving the validity of each claim would be a fact-intensive process. Also, while the existence of even one valid claim would be too many, at the same time 111 affiants out of a group of 2400 individuals is too low a proportion to prove a pattern and practice of discrimination.

h. Indifference of Senior Management

Finally, Plaintiffs argue that the indifference of Defendants' senior management to race discrimination supplies an element of commonality sufficient to warrant a determination that the Named Plaintiffs and all prospective class

members have been adversely affected in a discriminatory fashion.

Ironically, this section of Plaintiffs' brief points out that in response to findings of the Office of Federal Contract Compliance in 1994, GPC agreed to implement new procedures including the JobNet system, the structured interview guidelines, use of selection committees, and use of external recruitment and candidate services. Because the changes implemented did not produce the result of closing the salary and promotion gap between Caucasians and African-Americans, and because the Defendants' own self-study ("The Diversity Report Card") was critical of the extent of improvement, and because of the inability of Defendants' top representatives to answer certain deposition questions, Plaintiffs argue that the indifference of senior management is at such a level that the Court should find a common thread of "indifference" to define a cohesive class. It seems to the Court that Plaintiffs overreach in this argument.

i. Legal Discussion and Conclusion

The controlling case law interpreting Rule 23's requirement of commonality in employment discrimination cases is set forth in *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982), plus several decisions of the United States Court of Appeals for the Eleventh Circuit, *Nelson v. United States Steel Corp.*, 709 F.2d 675 (11th Cir. 1983), *Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), and *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566 (11th Cir. 1992).

In *Falcon*, the Supreme Court reversed a lower court ruling that allowed plaintiff, who alleged he had been denied a promotion on account of his national origin, to maintain a class action on behalf of all Mexican-American applicants for employment without identifying questions of law or fact common to the claim of the plaintiff and that of the class members. The Supreme Court noted that plaintiff had a meritorious promotion claim, but it held that this did not entitle him to represent class members who had hiring claims when plaintiff had failed to make a factual showing on the issue of commonality. The Court referred critically to the "across the board" rule which had previously allowed a victim of race discrimination to attack all unequal unemployment practices committed by an employer, regardless of whether plaintiff himself had been injured by such practices, referring in particular to *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (11th Cir. 1969).[45]

Falcon did leave open a window of opportunity for plaintiffs seeking certification, however:

> If petitioner used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of

---

[45] The Supreme Court quoted with approval Judge Godbold's specially concurring opinion in *Johnson*, wherein Judge Godbold expressed concern about potential unfairness to class members bound by an adverse judgment if the class definition was overly broad. Judge Godbold warned courts not to assume that "all will be well for surely the plaintiff will win and manna will fall on all members of the class." *Johnson* at 1127.

> Rule 23(a). Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes. In this regard it is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination. The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same face or national origin is insufficient to establish his standing to litigate on their behalf all possible claim of discrimination against a common employer.

Falcon, 457 U.S. at 159, n. 15 (Emphasis supplied).

In Nelson, the Court of Appeals affirmed the trial court's holding that commonality had not been established where the plaintiff had not established that the discrimination she allegedly suffered was "typical or relatedly, that a policy of race discrimination pervaded U. S. Steel's hiring practices." 709 F.2d at 679. The Court noted in footnote 9:

> The plaintiff's task in establishing the requisite commonality or typicality is more difficult where, as here, disparate treatment is alleged. Disparate impact cases typically involve readily identified, objectively applied employment practices such as testing procedures. The common reach of such practices is likely to be clearer and easier to establish than a general policy of race discrimination alleged to unite otherwise factually dissimilar disparate treatment claims. (Footnotes omitted).

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify an across the board class of both applicants and employees if the discrimination manifests itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes. (Footnote omitted) (emphasis supplied).

The Court of Appeals found that while the plaintiff had alleged a general policy of race discrimination, she had produced no reliable evidence to back up that claim. Therefore, the suit would degenerate into a series of mini-trials, which would be contrary to Rule 23's goal of judicial economy.

In *Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), the Court of Appeals vacated a district court order certifying a class, finding in part that the commonality requirement of Rule 23 had not been met when plaintiff, a rejected applicant for a clerical position, sought to represent those who had failed to pass a test required for another position and neither of the *Falcon* exceptions was met.

In *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566 (11th Cir. 1992), the Court of Appeals affirmed the trial court's denial of class certification, finding that plaintiffs were seeking certification of a class "challenging every employer practice with respect to that class", *id.* at 1570, and finding that plaintiff had not established that anything other than race was common to their claims.

While Plaintiffs may intend for individual Named Plaintiffs to represent different subgroups within the

prospective class, neither the Complaint nor the motion for class certification spells out the parameters of each Named Plaintiff's representative capacity with respect to any subgroup. It is not obvious how, or whether, individual Named Plaintiffs could appropriately represent particular subgroups. Thus, the Court considers that for all intents and purposes this is an "across the board" case which does not meet Rule 23's commonality requirement unless one of the *Falcon* exceptions recognized by the Supreme Court is met.

Plaintiffs have made vigorous efforts to establish a pattern and practice of discrimination or a disparate impact, either of which would establish essentially a presumption of discrimination affecting the entire class. Even when Plaintiffs' pattern and practice evidence is considered as a whole, however, it is not enough to convince the Court that race discrimination is Defendants' "standard operating procedure" as defined by Teamsters. Plaintiffs' evidence is insufficient in quantity and quality to make this determination, given the size and geographic scope of the Defendants' operations and the large number of employees who work for Defendants.

Similarly, Plaintiffs' efforts to establish that Defendants have an "entirely subjective hiring, promotion and compensation process" falls short. Plaintiffs' evidence does show that Defendants' managers exercise discretion in these areas, but that is different from an "entirely subjective decisionmaking process." Finally, Plaintiffs' statistical evidence regarding the existence of an adverse impact is unconvincing. For one thing, the evidence does not show proof of a convincing nexus between the claimed policies and the outcome due to its failure to adequately measure the treatment of similarly situated individuals. Secondly,

the extent of adverse outcome is not proven with convincing force by the expert testimony for the same reason.

The Court recognizes the enormity of the task borne by Plaintiffs to prove pattern and practice or adverse impact; however, the size of the burden is proportional to the task chosen by the very wide-ranging nature of this lawsuit.

C. Adequacy of Representation

For the reasons previously discussed, the Court does not believe that the Named Plaintiffs adequately represent the absent class members. The Court does find that Plaintiffs' counsel are capable and experienced lawyers who would more than adequately represent the class, were a class certified.

2. Rule 23(b)(2)

Under Rule 23(b)(2), the Court may certify a class when the requirements of Rule 23(a) are met and, in addition, the Court determines that the Defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(2), Fed. R. Civ. P.

When a class is certified under Rule 23(b)(2), the outcome of the litigation binds all members of the class, regardless of whether the outcome is favorable or unfavorable. Class members have no right to "opt out". *See* Rule 23(c)(3). Under controlling precedent, back pay is considered equitable relief and therefore can be awarded to class members in a case certified under Rule 23(b)(2). *Pettway v.*

American Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974). The added wrinkle here, however, is that Plaintiffs also seek compensatory and punitive damages – neither of which were available under Title VII when *Pettway* was decided, and both of which are classic forms of legal – not equitable – relief.

In *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2000), the Court of Appeals held that damages can only be awarded in a (b)(2) case where the damages sought are "incidental" to the claims for injunctive and equitable relief. Such "incidental damages" would be those group damages inherent in a finding of Defendants' liability to the Plaintiffs' class as a whole.

Following *Murray*, the Court finds this case cannot be certified under Rule 23(b)(2). Plaintiffs seek not only back pay, but also compensatory damages and punitive damages which would require highly individualized fact findings and which could not be termed merely incidental to an injunction or declaration in the class's favor.

As an alternative, Plaintiffs ask the Court to certify the equitable and legal claims of the class under Rule 23(b)(2), but to allow opt-outs regarding damages claims. Plaintiffs note that this Circuit has recognized the discretionary power of the district court to allow opt-outs in a 23(b)(2) case when "desirable to protect the interests of absent class members." *See Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981 Unit B). Also, in *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), the United States Court of Appeals for the Eleventh Circuit held that the district court had abused its discretion by refusing to approve an opt-out procedure in a 23(b)(2) case which had been settled for a payment of an aggregate sum to the

class as a whole. The Court of Appeals' stated rationale was that even though the class had been certified under Rule 23(b)(2), it actually was "functionally more similar" to a Rule 23(b)(3) case. *Id.* at 1154.

In the Court's opinion, neither *Penson* nor *Holmes* entitles the Plaintiffs to 23(b)(2) certification of damages claims with an opt-out feature for compensatory damages claims. *Penson* merely stands for the proposition that a district court had discretion to allow opt-outs in a case involving claims for back pay as well as injunctive relief. No compensatory damages claims were involved. *Holmes*, which also did not involve compensatory damages, was a case which had been settled. The Court of Appeals noted that in the settlement posture, the case was more like a 23(b)(3) case in which common issues predominated. Most importantly, these cases predate the Civil Rights Act of 1991, Pub.L.No. 102-166, 105 Stat. 1071 (1991), which added the right to seek compensatory and punitive damages and the right to jury trial in cases where these damages are sought.

Assuming that the Court does have the discretion to certify a class under Rule 23(b)(2) for both injunctive relief and damages, with individual opt-out rights as to damages claims, it would decline to do so. As stated elsewhere, individualized issues predominate in this case to such an extent that management of the case would be exceptionally difficult.

Plaintiffs next argue that issues affecting money damages do not predominate over issues of injunctive and declaratory relief because the latter forms of relief are more meaningful to the class. No express predominance requirement appears in Rule 23(b)(2), though the Advisory

Committee Notes state that "the subdivision [(b)(2)] does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Adv. Comm. Notes, 1966 Amendments, Fed.R.Civ.P. 23. Plaintiffs argue that while the Notes are not legally binding, a policy of liberal interpretation of civil rights law favors a reverse inference that money damages can be collected by a (b)(2) class so long as money damages are not the predominant form of relief. Plaintiffs argue here that money damages do not predominate because the proposed injunctive/declaratory relief – seeking programmatic changes in Defendants' personnel policies – is more important in the long run than individual monetary awards.

This argument, however, fails on three points. First, there is no binding precedent supporting Plaintiffs' "balancing" approach to (b)(2) certification in the Eleventh Circuit. In fact, the Eleventh Circuit has held specifically that in cases where the money damages are not a purely "group remedy," the damages claims do not predominate over any injunctive relief sought by the class. *Murray*, 244 F.3d at 812. The Court notes that in the *Murray* case the Eleventh Circuit did not evaluate the "importance" of one type of relief over the other. Rather, the Court found that the simple fact that plaintiffs sought individual monetary relief prevented certification.

Secondly, Plaintiffs have given the court little information as to what sort of injunctive or declaratory relief would be of such clear importance as to warrant a determination that equitable issues predominate over issues of damages. Plaintiffs merely state in the Complaint that they seek entry of an injunctive order "to end Defendants' discriminatory practices and to prevent current and future

harm to the Named Plaintiffs and the class", and of a declaratory order "that Defendants' acts and practices as set forth herein are in violation of the laws of the United States." Third Amended Complaint, p. 59. It does not seem, however that orders which merely reiterate general existing legal principles would be of the level of significance urged by Plaintiffs. Also, while Plaintiffs' briefs refer to needed "programmatic changes", it is not clear what discrete changes Plaintiffs have in mind which could be directed in a clear, enforceable order. Thus, the record in its present state does not convey why injunctive or declaratory relief would be of more value than money damages to prospective class members, assuming this were a legitimate consideration.

Finally, to some members of the prospective class (especially those who no longer work for Defendants), the injunctive and declaratory relief may be of far less importance than monetary damages.

For the foregoing reasons, the Court does not find that the sought-after injunctive/declaratory relief is of greater value or importance than the sought-after monetary relief. Further, the Court believes that such a balancing approach is inherently subjective, and in the absence of binding precedent requiring such an approach, the Court would be disinclined to use it.

Since a jury trial has been demanded in this case, the parties are entitled under the Seventh Amendment of the U.S. Constitution to have all factual legal issues determined by a single jury before decisions on equitable matters are made by the Court. *Ross v. Bernhard*, 396 U.S. 531, 538-39, 24 L. Ed. 2d 729, 90 S. Ct. 733 (1970). The authorities relied upon by Plaintiffs to argue that claims

for compensatory damages can be tried in an employment discrimination case certified under (b)(2), with findings on damages deferred until resolution of liability are not applicable and are not workable. Unlike the situation which predated the 1991 Act, the Court cannot conduct a bench trial on pattern and practice or disparate impact issues without a jury where a jury is demanded. Also, if these issues were resolved adversely to the Defendants, it would then be necessary for the jury to hear and rule on all individual claims for compensatory and punitive damages. The prospect of trying possibly two thousand of these claims before a single jury is simply absurd.

3. Rule 23(b)(3)

The Court also finds that class certification is inappropriate under Rule 23(b)(3). The two essential requirements of Rule 23(b)(3) are that the common questions "predominate over any questions affecting only individual members" and that the class action procedure be "superior . . . fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). "In other words, 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.'" *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997) (*citing Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1557-58 (11th Cir. 1989) (*quoting Nichols v. Mobile Bd. Of Realtors, Inc.*, 675 F.2d 671, 676 (5th Cir. Unit B 1982))).[46] The predominance inquiry under Rule

[46] In *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982), the Eleventh Circuit adopted as binding precedent decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

23(b)(3) is "far more demanding than Rule 23(a)'s commonality requirement." *Id.* (*quoting Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997).

In Jackson, the Eleventh Circuit found an abuse of discretion in a district court's decision to certify a class alleging a nationwide racially discriminatory practice of renting vacant rooms and providing housekeeping services. Plaintiffs argued that the issue whether defendant Motel 6 had a practice or policy of discriminating against patrons and employees on the basis of race predominated over individual issues. *Jackson v. Motel 6 Multipurpose*, 130 F.2d 999, 1005 (11th Cir. Fla. 1997). The district court had agreed with the plaintiffs and found that class resolution would be more efficient and cost-effective. Reversing the district court, however, the Eleventh Circuit noted that the "plaintiffs' claims will require distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination." *Id.* at 1006. Thus, the Court found that most of the plaintiffs' claims would stand or fall on the case-specific issues, rather than a finding of a pattern or practice of discrimination.

Similarly, in *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228, 1235-36 (11th Cir. 2000), the Eleventh Circuit Court of Appeals reaffirmed its holding in Jackson and emphasized the need for singularity of claims in the class action context.[47] Because there were too many "individualized issues, relative to the one common issue of

[47] The Court notes that *Rutstein* was not an employment discrimination case, but its reasoning is relevant to the instant case. *Id.* at 1239.

whether [Defendant] maintains a policy or practice of discrimination," the Court found that the plaintiffs failed to meet the 'predomination' requirement of Rule 23(b)(3) and therefore could not proceed as a class with their claims arising under Section 1981. *Id.* at 1235.

In the present case, Plaintiffs seek certification in part modeled after the United States Supreme Court's decision in the *Teamsters* decision, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977), in which the Court found that the question of whether defendants have engaged in a pattern and practice of discrimination is a critical factor which may connect the claims of class members.[48] *Id.* at 336-39. However, the pattern and practice standard described in *Teamsters* is not met in the instant case. The *Rutstein* Court noted that the *Teamsters* rationale was appropriate where the "number of African-American and Spanish-surnamed persons hired for line driver positions approached the 'inexorable zero'" or where "'in the 37 years preceding the institution of the lawsuit the employer did not have a single black [person] on its payroll.'" *Rutstein*, 211 F.3d at 1236-37 (*quoting Teamsters*, 431 U.S. at 342, n.23, and *Paradise v. Prescott*, 767 F.2d 1514, 1529 (11th Cir. 1985); *compare Reynolds v. Roberts*, 202 F.3d 1303, 1319 n. 27 (11th Cir. 2000) ("It is undisputed that [defendant] hired thousands of blacks" and promoted many of these individuals to higher positions. "In light of this, there can be no inference that [defendant's] policies and practices

[48] The *Teamsters* case did not involve class certification under Rule 23, but instead involved a statutory procedure allowing the Attorney General to bring a civil action alleging violations of Title VII. *Teamsters*, 431 U.S. at 328.

injured every member of the plaintiff classes by discriminating against him or her on account of race.").

Ultimately, the Court in *Rutstein* concluded that, in any class action context, "Serious drawbacks to the maintenance of a class action are presented where initial determinations, such as the issue of liability *vel non*, turn upon highly individualized facts." *quoting McCarthy v. Kleindienst*, 239 U.S. App. D.C. 247, 741 F.2d 1406, 1412 (D.C. Cir. 1984); *see Andrews v. American Telephone & Telegraph Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996) (in action against telephone companies' provision of 900-number services in which plaintiffs claimed, *inter alia*, that companies were violating gambling laws, Court held that "aspects of each 900-number program will have to be individually examined to determine whether a particular program actually involves gambling or runs afoul of state gaming laws").

Similarly, as previously discussed, Plaintiffs rely on statistical evidence to provide over-arching proof of discrimination which would connect class members' claims. However, because of limitations in Plaintiffs' proof, the statistical evidence is insufficient to show that Defendants' personnel policies disparately impacted the Plaintiff class, or that Defendants had a general policy of discrimination.

Even if Plaintiffs' pattern and practice or disparate impact theories were viable, however, the Court does not believe that certification under Rule 23(b)(3) would be appropriate. The factual detail needed to determine both liability and individual damages claims for perhaps 2000 individuals would overwhelm the common elements of proof.

Plaintiffs assert that "class treatment of this controversy is clearly superior to resolution through the filing of a host of individual actions." (Plaintiffs' Brief, p. 58). The Court finds that class certification in the instant case, however, would lead to an unmanageable and fragmented series of individual claims. Defendants contend, and the Court agrees, that severing claims or bifurcating liability and damages, as Plaintiffs suggest, will not solve these unique problems. Instead, as noted above, such individual claims will ultimately turn on the particular facts and circumstances of each prospective class member's claims, including whether the individual was subjected to the alleged disparate treatment or unlawful harassment as well as a calculation of individualized damages with respect to these divergent claims.

In this case, the manageability concerns associated with the individualized nature of the prospective class outweigh any benefit attained from class action litigation as prescribed by Rule 23 of the Federal Rules of Civil Procedure. As such, the Court finds that class treatment is not appropriate.

3 [sic]. Hybrid Claim

Plaintiffs also suggest, as an alternative, that the court certify claims for equitable relief under (b)(2) and claims for damages under (b)(3). This variation, however, adds no new options to those already discussed. The fact is that common elements of proof would not predominate in any event so as to meet the requirements of (b)(3).

VIII. SUMMARY

Because neither the requirements of Rule 23(a) or (b) are met, Plaintiffs' motion for class certification is hereby DENIED. Plaintiffs' request for an evidentiary hearing on the certification issues is also DENIED. Plaintiffs' motion to strike the report of Dr. Ronald Sims and Defendants' motion to strike the second report of Dr. Madden are DENIED.

SO ORDERED, this 11th day of October, 2001.

/s/ ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 03-12230-AA

CORNELIUS COOPER,
MICHAEL EDWARDS, et al.,

Plaintiffs-Appellants,

versus

SOUTHERN COMPANY,
GEORGIA POWER
COMPANY, et al.,

Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19___, ____ F.2d ____).

Before: ANDERSON, CARNES and MARCUS, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Bank are DENIED.

ENTERED FOR THE COURT:

[ENTERED April 15, 2005]

/s/ Stanley Marcus
United States Circuit Judge

No. 03-12230

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Cornelius COOPER, Michael EDWARDS,
Charcella GREEN, Patricia HARRIS,
Sarah Jean HARRIS, Irene McCULLERS,
and Carolyn WILSON,

Plaintiffs-Appellants,

v.

SOUTHERN COMPANY, GEORGIA POWER
COMPANY, SOUTHERN COMPANY
SERVICES, INC., and SOUTHERN COMPANY
ENERGY SOLUTIONS, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia (Atlanta)
Hon. Orinda D. Evans

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

NICHOLAS M. INZEO
Acting Deputy General Counsel

PHILIP B. SKLOVER
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

DORI K. BERNSTEIN
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY
COMMISSION
Office of General Counsel
1801 L Street, N.W.,
Room 7046
Washington, D.C. 20507
(202) 663-4734

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1, I hereby certify that the following persons or entities have an interest in the outcome of this case:

1. Chris Arbery, Esq.
2. Emmet Bondurant, Esq.
3. Dori Bernstein, Esq.
4. Johnnie Cochran, Jr., Esq.
5. Cornelius Cooper
6. Von DuBose, Esq.
7. Michael Edwards
8. Equal Employment Opportunity Commission (EEOC)
9. The Honorable Orinda Evans
10. Georgia Power Company, Inc.
11. Richard Gerakitis, Esq.
12. J. Keith Givens, Esq.
13. Charcella Green
14. Ashley Hager, Esq.
15. Patricia Harris
16. Sarah Jean Harris
17. Nicholas Inzeo, Esq.
18. Irene McCullers
19. Ray Persons, Esq.
20. Stephen Riddell, Esq.

21. Steven Rosenwasser, Esq.
22. Hezekiah Sistrunk, Jr., Esq.
23. Philip Sklover, Esq.
24. Southern Company, Inc.
25. Southern Company Energy Solutions, Inc.
26. Southern Company Services, Inc.
27. Michael Terry, Esq.
28. Joshua Thorpe, Esq.
29. Carolyn Wheeler, Esq.
30. Carolyn Wilson

Pursuant to Fed.R.App.P. 26.1, the EEOC, as a government agency, need not file a corporate disclosure statement.

/s/
Dori K. Bernstein

TABLE OF CONTENTS

	Page
CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	iii
TABLE OF CITATIONS	iv
STATEMENT OF INTEREST	1
STATEMENT OF THE ISSUES	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	15
ARGUMENT	17

PLAINTIFFS SATISFY ALL REQUIREMENTS OF RULE 23(b)(2) TO LITIGATE CLASS CLAIMS OF SYSTEMIC RACE DISCRIMINATION IN PAY AND PROMOTIONS AT SOUTHERN COMPANY, AND HAVE PRODUCED SUFFICIENT EVIDENCE TO TRY THEIR PATTERN-OR-PRACTICE AND DISPARATE IMPACT CLAIMS TO A JURY 17

CONCLUSION 32

CERTIFICATE OF COMPLIANCE 34

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 31

Bazemore v. Friday, 478 U.S. 385 (1986) ... 24, 25, 26, 30, 31

Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984) 17

Cooper v. Southern Co., 205 F.R.D. 596 (N.D. Ga. 2001) ..... *passim*

Cooper v. Southern Co., 2003 WL 1889268 (N.D. Ga. 2003) 14

Cooper v. Southern Co., 2003 WL 1889273 (N.D. Ga. 2003) 14

Cooper v. Southern Co., 2003 WL 1889274 (N.D. Ga. 2003) 14

Cooper v. Southern Co., 2003 WL 1889275 (N.D. Ga. 2003) 14, 15, 25

Cooper v. Southern Co., 2003 WL 1889282 (N.D. Ga. 2003) 14

Cooper v. Southern Co., 2003 WL 1889283 (N.D. Ga. 2003) 14

Cooper v. Southern Co., 2003 WL 1889284 (N.D. Ga. 2003) 14

Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986) 29

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 22

General Telephone v. Falcon, 457 U.S. 147 (1982) ... 18, 19, 22

Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) 10, 18, 32

Holmes v. Continental Can Co., 206 F.2d 1144 (11th Cir. 1983) 17, 21

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 29, 30

Kilgo v. Bowman Transp. Co., 789 F.2d 859 (11th Cir. 1986) 29

Nelson v. United Steel Corp., 709 F.2d 675 (11th Cir. 1983) 19, 23

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) 21

Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000) 32

Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2003) 22

VisaCheck/Mastermoney Litigation, 280 F.3d 124 (2d Cir. 2001) 26

Watson v. Fort Worth Bank and Trust, 487 U.S. 978 (1988) 18, 32

STATUTES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* 1

42 U.S.C. § 1981 7

RULES AND REGULATIONS

Fed.R.App.P. 26.1 ii

Fed.R.App.P. 29(a) 1

Fed.R.App.P. 29(d) 34

Fed.R.Civ.P. 23 ..... 1, 19, 21, 22, 23

Fed.R.Civ.P. 23(a) 13, 16, 18, 23, 27

Fed.R.Civ.P. 23(b) 21

Fed.R.Civ.P. 23(b)(2) ..... iii, 1, 13, 16, 17, 21, 22, 32

Fed.R.Civ.P. 32(a)(7)(B) 34

11th Cir. R. 26.1-1 i

STATEMENT OF INTEREST

The EEOC administers and enforces Title VII of the Civil Rights Act of 1964, 42 USC §§ 2000e *et seq.* This appeal involves the proper application of Fed.R.Civ.P. 23 to Title VII systemic discrimination claims, and the quantum of evidence required to proceed to trial on pattern-or-practice and disparate impact claims challenging a system of subjective, discretionary decisionmaking. Because the ability of private litigants to challenge systemic discrimination on a class-wide basis is vital to the effective enforcement of Title VII, and because the legal standards and evidentiary burdens for proving systemic discrimination are the same in government enforcement actions as in

private class litigation, the EEOC offers its views to the Court. *See* Fed.R.App.P. 29(a).

STATEMENT OF THE ISSUES

Whether the district court abused its discretion in denying class certification under Fed.R.Civ.P. 23(b)(2) to litigate claims of systemic racial discrimination caused by defendants' common pay and promotion policies.

Whether the district court erred in granting summary judgment against plaintiffs' claims that defendants' common policy of affording managers unmonitored discretion to use subjective criteria in making compensation and promotion decisions fostered a pattern or practice of disparate treatment, or caused an adverse disparate impact, against African-American employees.

STATEMENT OF FACTS

Defendants-appellees are Southern Company and subsidiaries Georgia Power Company (GPC), Southern Company Energy Solutions (SCES), and Southern Company Services (SCS).[1] *See Cooper v. Southern Co.*, 205 FRD 596 (N.D. Ga. 2001).[2]

In 1995, SoCo consolidated the human resources (HR) functions – including staffing, compensation, and EEO compliance – of each of its subsidiaries into a centralized

---

[1] Except where identification of a particular defendant company is relevant, defendants will be referenced collectively as "SoCo."

[2] References to the district court's rulings will cite the published decisions. All other record references correspond to numbered docket entries (DE) on the district court docket.

operation at SCS "to implement common compensation and promotion policies and practices between the companies." DE141, Ex.B, ¶ 3; 205 FRD at 600 (finding GPC, SCES, and SCS "utilize common compensation and promotions policies promulgated and administered by . . . SCS").

Under SoCo's personnel policies, non-union jobs[3] are normally filled internally through posting on SoCo's "computer intranet system known as 'JobNet,' which is accessible to virtually all [SoCo] employees." *Id.* at 600. Mark Wolf, SoCo's Staffing Director, oversees the SCS department that provides staffing "infrastructure" for all SoCo subsidiaries. DE117, Ex.9 at 5-7. While SCS has developed detailed instructions and procedures for job posting, applicant screening, interviews, and candidate selection, *see* DE119, Ex.36-42, Wolf testified that SoCo's policy is to "encourage" managers to follow these "guidelines" for filling vacancies, but "there is no requirement" that they do so. DE117, Ex.9 at 67. Wolf was unaware of any effort by SoCo or its subsidiaries to monitor or control the internal hiring and promotion process to ensure managers exercise their discretion in a non-discriminatory manner and use job-related criteria to select employees for promotion. *Id.* at 69-70.

SoCo's internal hiring policies afford each hiring manager discretion to decide: whether to consult HR in

[3] Some of GPC's employees are covered by a collective bargaining agreement (CBA) with the International Brotherhood of Electrical Workers. The terms of the CBA govern promotion to positions covered by the CBA, and compensation of employees holding CBA-covered positions. *See* 205 FRD at 599. Plaintiffs do not claim CBA-covered promotions and compensation are racially discriminatory. *See* DE141 at 5-6.

filling a vacancy;[4] whether to post an opening on JobNet;[5] what job qualifications to list in the posting, DE117, Ex.9 at 59; what criteria to apply in screening applicants for interviews, *id.* at 52-53; whether to use a selection committee, *id.* at 84; whether to follow "structured interview" guidelines, *id.* at 67; what to ask interviewees, *id.* at 75, 82; whether to ask the same questions of each candidate for the same position, *id.* at 77; and which candidate to hire. "Even in cases where a selection committee is used, the manager is not required to accept the committee's recommendation." 205 FRD at 60-0.

SoCo further entrusts individual managers with discretion to promote employees without posting a vacancy by: awarding "promotions within a progressive job family"; identifying an employee with "demonstrated leadership potential" and providing him "with opportunities to obtain experience in other areas" through a "developmental move" to a new position; and "re-evaluat[ing] jobs within their departments if they determine that the actual skills are above or below those anticipated by the job criteria." *See* 205 FRD at 600-01; DE119, Ex.36 at E212-13.

---

[4] DE119, Ex.57 at L1314 (1998 SoCo audit found "HR business reps have minimal involvement in selection process either through facilitation or consultation services").

[5] Internal SoCo audits reveal that in practice many jobs are filled without posting. *See* Ex.57 at L1314 (1998 audit revealed "high level of inconsistency in hiring process, including the use of JobNet and/or retaining interview records, and selection documentation"); Ex.62 at N1895 ("recent audit" of "approximately 1300 job transactions" found "50% were not posted and 50% had incomplete or no documentation"); Ex.63 at J5841 (spreadsheet showing 39.9% of 1342 jobs filled were posted).

SoCo employees in non-CBA jobs are compensated pursuant to "a common job, salary or pay grade system . . . formulated by . . . SCS for non-exempt employees (grades NE1 through NE9) and exempt employees (grades E1 to E15)." 205 FRD at 600.[6] SoCo's pay grade system features broad and overlapping salary ranges. In 1998, for example, "grade E5 ranged from $42,396 to $67,837. Grade E3 was approximately $24,020 to $54,432." *Id.* Under SoCo's pay grade system, each job may be slotted at more than one grade, authorizing compensation within multiple salary ranges. *Id.* at 612 n.29. A job posted in Grades 3-5 in 1998 could thus carry an annual base salary of anywhere between $24,020 and $67,837.

Steven Wilkinson, SoCo's Compensation Manager, heads the SCS department that develops and administers compensation policies for SoCo subsidiaries, including GPC and SCES. *See* DE117, Ex.8 at 18-21. According to Wilkinson, SoCo delegates to individual managers discretion to assign job grades and set base salaries, *id.* at 42-45, and "there are no set standards, there's no formula as such to follow," and no controls in place "to ensure a manager does not discriminate" by assigning lower job grades to black employees. *Id.* at 195-96. Nor are there standards or controls to ensure managers assign the same pay grade to jobs that entail the same duties. *Id.* at 201. Each manager also has discretion to decide the percentage increase over

[6] The "non-exempt" and "exempt" designations indicate whether a position is subject to the wage and hour requirements of the Fair Labor Standards Act. *See* 205 FRD at 599. SoCo further divides non-exempt employees into "technical" and "non-technical" designations, and has established job grades and salary ranges for each. *See* DE119, Ex.72 at E675-79.

base salary an employee will receive upon promotion to a different job. *Id.* at 98, 103.

In addition to base salary, employees in nearly all non-CBA jobs are eligible for annual merit pay increases and lump sum incentive bonuses under SoCo's common Performance Pay Plan (PPP). *See* 205 FRD at 601. While SoCo provides "general considerations" and "helpful hints" for awarding compensation under these common plans, *see* DE119, Ex.73 at F664, F669 & Ex.74, "managers and supervisors within individual departments have discretion to determine how to allocate individual merit increases" and incentive bonuses among subordinate employees. 205 FRD at 601.

Wilkinson testified that SoCo affords each manager "broad . . . discretion to establish a methodology" to distribute bonuses and merit increases by ranking the comparative contributions of employees based on performance. DE117, Ex.8 at 147-48, 161, 202-03. Under SoCo's policy, Wilkinson agreed, a manager "could establish different criteria to evaluate" five different employees holding the same job under his supervision. *Id.* at 151. According to Wilkinson, "there's no review" by HR "of the performance evaluations or the documentation" to determine whether managers are using job-related factors to evaluate employees. *Id.* at 153. Aside from requiring a manager to stay within his departmental budget, Wilkinson testified, "there are no absolute limits" on each manager's discretion to determine the size of each employee's annual pay increase. *Id.* at 201-02

Seven African-American employees sued SoCo in July 2000, asserting individual and class claims of race discrimination in violation of Title VII and 42 U.S.C. §1981.

See 205 FRD at 597-98. The named plaintiffs variously allege that they were denied positions, promotional opportunities, or compensation based on race pursuant to SoCo's common pay and promotion policies. *See id.* at 602-05; DE141, Ex.E. The complaint sought the full range of declaratory, injunctive, equitable, and monetary relief provided by law, and demanded a jury trial. DE62 at 59. Plaintiffs sought class certification to litigate claims of systemic race-based disparate treatment and adverse impact caused by SoCo's policies for awarding compensation in and promotion to non-CBA jobs. The proposed class included approximately 2,400 African-Americans employed by SoCo at any time from July 1998 to the present. 205 FRD at 598-99.

To support class certification, plaintiffs submitted documentary and testimonial evidence of SoCo's policies and practices on internal hiring, promotions, and compensation, *see* DE117 & 119, and SoCo-generated documents indicating racial disparities in these areas during the relevant time period. A 1998 audit of SoCo's internal hiring practices disclosed that "interview pools had a majority white male population; records indicate that when diverse applicant pools are provided, hiring managers are interviewing primarily white male candidates." DE119, Ex.57 at L1314; *see also* Ex.63 at J5841 (internal SoCo spreadsheet analysis showing that of 1342 positions filled, 13.6% of selections were from a "diverse pool" of candidates). The audit further showed that 98% of "promotions resulting from job reevaluations/developmental assignments" went to white males, 2% to females, and 0% were awarded to minority employees. Ex.57 at L1314.

"Diversity Report Cards" for GPC (dated September 1999) and SoCo (dated August 1999), reported the following

racial disparities in compensation and workforce composition: a "glass ceiling effect" on African-American representation at all levels of SoCo management;[7] a "glass wall effect" in "minority leadership by function," Ex.86 at L373; a substantial racial disparity in the average pay of exempt employees at SoCo, *id.* at L364, L374; substantial racial disparities in the average salaries of employees in both exempt and non-exempt jobs at GPC and SCS, *id.* at L341-42, L352-53; and a substantial racial disparity in the distribution of annual PPP incentive bonuses. *Id.* ay [sic] L364, L371.

Dr. Janice Madden, a labor economist, analyzed workforce data supplied by SoCo and prepared an expert report that confirms the statistical significance of the racial disparities reflected in SoCo's internal reports. *See* DE119, Ex.1; DE141, Ex.B. Using a "multiple pools model" and multi-regression analyses to compare the promotion rates of employees in the same salary grade, subsidiary, and year, Dr. Madden found "statistically significant shortfalls in the numbers of promotions awarded to African-American employees, when compared to Caucasian employees . . . for 1996 through 1999." *Id.* at 5. Dr. Madden further analyzed the data, controlling for education level, experience (measured by both tenure at SoCo and years since completing education), and job function[8] at hiring (or in 1995 if hired before 1995). *See* DE119, Ex.1 at 12-15; DE141, Ex.B at 2-6. The results of these regression

---

[7] Ex.86 at L372, L364 (17.4% of workforce is African-American, compared to 7.4% of "officials & managers").

[8] Dr. Madden derived job function descriptions (such as accounting, customer services, engineering services, generation, human resources, marketing, security) from SoCo's database. DE141, Ex.B at App.A.

analyses "show increases in both the coefficient and the statistical significance of estimated racial disparities in promotions when credentials (experience, education and job function) were added to the model," leading Dr. Madden to "conclude that African-Americans are at least as qualified [or "more qualified"] for promotion as Caucasians in the same salary grade, subsidiary, and year." *Id.* at 5. "The racial differential in promotions for the entire period," Dr. Madden calculated, "is 7.07 standard deviations beyond no difference (or zero). The probability that this racial difference could have occurred by chance is less than 26 in ten trillion."[9] *Id.*

Dr. Madden's multi-regression analyses of SoCo's data further revealed that "African-American employees have statistically significant lower compensation than Caucasians during the period 1995-1999." *Id.* at 9; *see* DE119, Ex.1 at 15-20; DE141, Ex.B at 6-9. "African-Americans receive 2.56% to 3.52% less than Caucasian employees in the same salary grade and subsidiary with the same time since completing schooling, tenure at Southern, level of education and job function." *Id.* at 9. Dr. Madden

---

[9] Dr. Madden measured the standard deviation for each year as follows: 1996 = 3.75; 1997 = 1.72; 1998 = 3.71; 1999 = 4.25. DE141, Ex.B at Table R4'. The Supreme Court has long approved standard deviation calculations as a "precise method of measuring the significance of . . . statistical disparities" based on race. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309 n.14 (1977). The Court has recognized that "as a general rule for such large samples, if the difference between the expected value [*i.e.*, the expected number of African-Americans promoted] and the observed number [*i.e.*, the actual number of African-Americans promoted] is greater than two or three standard deviations, then the hypothesis that [employees] were [promoted] without regard to race would be suspect." *Id.* (internal citation omitted).

further calculated that once "the effects of the racially differentiated salary grades are removed, the salary disadvantage of African-Americans grows to a range of 13.17% to 14.33%." *Id.* In each year, Dr. Madden found, "the statistical significance of the race differences in compensation, after considering the effects of any racial differences in subsidiary, education, work experience, job function, and salary grade . . . strongly rejects the possibility that they could have been generated by chance." *Id.* at 7. Dr. Madden determined that "the overall pattern of lower compensation for African-Americans . . . is at levels well beyond those required to dismiss random variation," and that the results of her analyses "are consistent with racial discrimination." *Id.* at 8.

Plaintiffs offered evidence that the pattern of racial disparities in promotions and compensation at SoCo is nothing new. In a compliance review of GPC's operations covering the period November 1991 to July 1994, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) found numerous EEO violations in awarding promotions and compensation to minority employees of SoCo's largest subsidiary, including: salary disparities between minorities and non-minorities in similar positions; deviations from job posting procedures to the disadvantage of minority employees; "numerous examples . . . of non-minorities . . . selected for promotion with less or equal qualification than the minority . . . applicants"; failure to ensure minorities "receive career progression moves comparable to non-minorities"; and

underrepresentation of minorities in key areas, including management. DE119, Ex.14 at 3-7.[10]

Plaintiffs also submitted the following evidence of racial animus at SoCo facilities: photographs and documentary proof, generated in 2000, of at least 13 nooses displayed in eight GPC plants, some over a period of years, DE119, Ex.3-5; a compendium of racially offensive "jokes" posted on bulletin boards in company facilities, Ex.6; a "KKK cartoon" placed in employee mailboxes, Ex.7; a photograph of a hat with a racial epithet worn in the workplace, Ex.8; and testimonial accounts by numerous black employees of racially offensive slurs, "jokes," epithets, and harassment at work. Ex.11. Finally, 111 prospective class members signed affidavits recounting instances of alleged racial discrimination during their employment at SoCo. *See* DE120.

The district court denied class certification on October 11, 2001. Despite finding that SoCo subsidiaries "utilize common compensation and promotions policies promulgated and administered by . . . SCS," 205 FRD at 600, the court concluded that plaintiffs' systemic claims that these common policies have fostered a pattern or practice of racially disparate treatment or adverse impact do not raise questions of law or fact common to the class. *Id.* at 626. The court further found that none of the named plaintiffs, each of whom claims a denial of pay or promotional opportunities

[10] In 1994, GPC and OFCCP negotiated a conciliation agreement to resolve these violations. Following GPC's final report under the agreement, OFCCP informed SoCo in 1997 that "[t]he placement results for protected groups, particularly minorities and minority females, into [mid-level manager to executive level] positions over the two-year reporting period was poor." DE119, Ex.17.

pursuant to these policies, has "claims typical of the class as a whole." *Id.* at 610. There was no dispute that the proposed class met Rule 23(a)'s numerosity requirement, *id.* at 608, and the court found plaintiffs' "counsel are capable and experienced lawyers who would more than adequately represent the class." *Id.* at 627.

The court also decided that "this case cannot be certified under Rule 23(b)(2)," because plaintiffs' requests for compensatory and punitive damages would entail "highly individualized fact findings" that were not "merely incidental to an injunction or declaration in the class's favor." *Id.* at 627. The court never addressed plaintiffs' alternative request to certify a class under Rule 23(b)(2) solely to determine SoCo's liability for a pattern or practice of disparate treatment or adverse impact against African-Americans in promotions and compensation, and to award appropriate class-wide declaratory, injunctive, and equitable relief.

On March 31, 2003, the court issued seven opinions granting summary judgment against the claims advanced by each named plaintiff. *See Cooper v. Southern Company*, 2003 WL 1889268 (N.D. Ga., Mar. 31, 2003) (Edwards); 2003 WL 1889273 (S.J. Harris); 2003 WL 1889274 (P. Harris); 2003 WL 1889275 (McCullers); 2003 WL 1889282 (Green); 2003 WL 1889283 (Wilson); 2003 WL 1957484 (Cooper).[11] In resolving the individual claims, the court included virtually identical text in each opinion rejecting plaintiffs' claims that SoCo's policies and practices for

[11] Official citations to the court's summary judgment opinions are not yet available. For ease of reference, citations to each opinion will reference the name of the plaintiff whose claims are resolved and the WestLaw page number.

awarding promotions to and compensation for non-CBA positions have fostered a pattern or practice of race-based disparate treatment by individual managers, *see Edwards* at *13-*14; *S.J. Harris* at *10-*11; *P. Harris* at *7; *McCullers* at *6-*7; *Green* at *10-*11; *Wilson* at *12; *Cooper* at *14, or resulted in an adverse disparate impact against black employees. *See Edwards* at *14-15; *McCullers* at *8-*9; *Green* at *11-*12; *Wilson* at *12-*13.

The court included two paragraphs in each opinion that referenced only plaintiffs' statistical evidence and SoCo's "internal personnel documents," and rejected plaintiffs' pattern-or-practice claims of racially disparate treatment under SoCo's promotion and compensation policies. *See, e.g., McCullers* at *6-*7. Without mentioning the additional evidence plaintiffs submitted to support their pattern-or-practice claims (*i.e.*, proof of nooses and racial hostility in various SoCo facilities; OFCCP findings of racial disparities in promotions and compensation at GPC during the early 1990s; anecdotal evidence of 111 SoCo employees recounting specific incidents of racial discrimination and harassment), the court summarily concluded that each plaintiff "failed to come forward with evidence sufficient to prove that intentional discrimination was [SoCo's] 'standard operating procedure,'" and granted summary judgment against plaintiffs' pattern-or-practice claim. *Id.* (internal citation omitted). The court further ruled that each plaintiff "failed to establish that manager discretion in compensation and promotion decisions caused a statistically significant disparity" adverse to African-Americans, and granted summary judgment against plaintiffs' disparate impact claims. *Id.* at *8.

SUMMARY OF ARGUMENT

The district court abused its discretion by effectively deciding the merits of plaintiffs' claims of systemic race discrimination in the guise of denying class certification. The court further erred in holding plaintiffs' evidence insufficient for a jury to find that SoCo's common policies of committing pay and promotion decisions to the unmonitored discretion of individual managers have fostered a pattern or practice of disparate treatment, or caused an adverse disparate impact, against African-Americans. Viewed under the appropriate legal standards established in Supreme Court precedent, plaintiffs plainly satisfy the prerequisites of Rule 23(a) and have presented evidence sufficient to warrant a trial on their systemic discrimination claims. Plaintiffs' request to certify a class solely to determine SoCo's liability for systemic discrimination and award appropriate declaratory, injunctive, and equitable relief – an alternative the district court did not even address – is precisely the type of action contemplated for class treatment under Rule 23(b)(2). This Court should therefore reverse the summary judgment for SoCo and the denial of class certification, and direct the court on remand to certify a class under Rule 23(b)(2) to litigate at trial the questions of whether SoCo's pay and promotion policies foster a pattern-or-practice of disparate treatment, or an adverse disparate impact, against African-Americans, and, if appropriate, to award declaratory, injunctive, and equitable relief.

ARGUMENT

PLAINTIFFS SATISFY ALL REQUIREMENTS OF RULE 23(b)(2) TO LITIGATE CLASS CLAIMS OF SYSTEMIC RACE DISCRIMINATION IN PAY AND PROMOTIONS AT SOUTHERN COMPANY, AND HAVE PRODUCED SUFFICIENT EVIDENCE TO TRY THEIR PATTERN-OR-PRACTICE AND DISPARATE IMPACT CLAIMS TO A JURY.

The district court abused its discretion in refusing to certify a class pursuant to Rule 23(b)(2), and erred in granting summary judgment against plaintiffs' claims of systemic race discrimination. These rulings betray this Court's longstanding "conviction that Title VII and the class action rule should be construed so as to further the strong public policy of eradicating all vestiges of racial discrimination in employment." *Holmes v. Continental Can Co.*, 206 F.2d 1144, 1152 (11th Cir. 1983).

The Supreme Court in *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 n.9 (1984), explained that

> [t]he crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decision-making.

Id. at 867. A policy or practice of committing employment decisions to the subjective discretion of individual managers or supervisors may be challenged under Title VII as fostering a pattern or practice of disparate treatment,

Hazelwood School Dist. v. United States, 433 U.S. 299, 301-02 (1977) (challenging pattern or practice of intentional racial discrimination in "relatively unstructured procedures for hiring teachers" that delegated to "each school principal . . . virtually unlimited discretion . . . to hire the 'most competent' person available"), or resulting in an unjustified disparate impact. *See Watson v. Fort Worth Bank and Trust*, 487 U.S. 978, 992 (1988) ("subjective or discretionary employment practices may be analyzed under the disparate impact approach").

"The commonality and typicality requirements of Rule 23(a) tend to merge" because

> [b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. These requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.

General Telephone v. Falcon, 457 U.S. 147, 157 n.13 (1982). Here, these three requirements are plainly met. Plaintiffs' pattern-or-practice and disparate impact claims raise questions of law and fact common to every African-American employee whose compensation and opportunities for advancement may be limited under SoCo's common system of delegating to individual managers virtually complete discretion to make pay and promotion decisions for employees in non-CBA jobs. The resolution of plaintiffs'

claims of systemic discrimination rests on the same evidence and identical legal precedent. *See Nelson v. United Steel Corp.*, 709 F.2d 675, 679 (11th Cir. 1983) (*Falcon* requires plaintiff to show "proof or legal arguments involved in her claims and class claims would be overlapping so that . . . class suit would advance Rule 23's goal of judicial economy"). Ironically, the district court in effect acknowledged the commonality of the legal and factual questions raised by plaintiffs' pattern-or-practice and disparate impact claims by including virtually identical passages in each summary judgment opinion to resolve them.

Furthermore, the individual claims of each named plaintiff that s/he was denied a promotion or compensation because of race pursuant to SoCo's common policies are typical of the claims of absent class members who were discriminatorily denied promotions or compensation under the same policies. In finding that individual plaintiffs' claims were typical only of portions of the class (*i.e.*, employees holding positions at his/her grade level, or in the same non-exempt or exempt status), and that none of the named plaintiffs raised claims typical of management-level employees, 205 FRD at 610, the court disregarded undisputed evidence (and its own findings, *id.* at 600) that the same policies and practices under which each plaintiff claims s/he was denied promotion to a non-CBA job, or received a lower salary or bonus in such a job, apply to all promotion and compensation decisions for non-CBA jobs at every grade level, whether exempt or non-exempt.

Finally, every class member shares with named plaintiffs the same interest in establishing whether SoCo's common pay and promotion policies foster systemic racial discrimination and, if so, in securing declaratory and

injunctive relief to eliminate the discriminatory practices and ensure equal opportunity in the areas of compensation and advancement. Because the named plaintiffs have every incentive to litigate vigorously the systemic discrimination claims, and have retained able and experienced counsel, they have demonstrated their adequacy as class representatives. Plaintiffs thus satisfy all four prerequisites of Rule 23(a).

Plaintiffs' request to certify a class solely to determine SoCo's liability for systemic discrimination and award appropriate declaratory, injunctive, and equitable relief – an alternative the district court did not even address – is precisely the type of claim contemplated for class treatment under Rule 23(b)(2).[12] "The Advisory Committee Note cited cases enjoining violations of civil rights as 'illustrative' of the types of cases properly cognizable under subsection (b)(2), ... as did the reporter of the rules revision committee in his personal commentary on the 1966 amendments" to Rule 23. *Holmes*, 706 F.2d at 1155. The sole basis for the district court's denial of certification under Rule 23(b) was the predominance of individualized determinations required to resolve individual class members'

[12] Under this proposal, the class claims of systemic discrimination (*i.e.*, pattern-or-practice and disparate impact), and the individual claims of the seven named plaintiffs, would be resolved in this action. A judgment of liability on either systemic claim would require an award of class-wide declaratory and injunctive relief, and entitle absent class members to litigate separately their individual claims that they were denied promotions or compensation pursuant to SoCo's discriminatory policies. The district court acknowledged "controlling precedent" holding that "back pay is considered equitable relief and therefore can be awarded to class members in a case certified under Rule 23(b)(2)." 205 FRD at 627 (citing *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir. 1974)).

claims for monetary damages. Because plaintiffs' alternative suggestion to certify only the claims for class-wide declaratory, injunctive, and equitable relief eliminates entirely this concern, this Court should reverse and remand with directions to certify plaintiffs' claims of systemic discrimination to determine liability and appropriate declaratory, injunctive, and equitable relief. *See Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 172 (2d Cir. 2001) (vacating dismissal of Title VII systemic racial discrimination suit challenging company-wide policy of delegating to department supervisors discretionary authority to make discipline and promotion decisions, and directing district court to certify plaintiffs' disparate impact claim and, at a minimum, the liability stage of plaintiffs' pattern-or-practice claim under Rule 23(b)(2)), *cert. denied*, 535 U.S. 951 (2002).

The district court abused its discretion by effectively deciding the merits of plaintiffs' pattern-or-practice and disparate impact claims – without a hearing, let alone a jury trial – in the guise of denying class certification. While "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," *Falcon*, 457 U.S. at 160 (internal citations omitted), the Supreme Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974), found "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Although a plaintiff seeking certification is "obligated to show, in at least a preliminary fashion, the required commonality between her claims and those of the putative class," her "'burden of proof to demonstrate the

existence of this common question entails . . . less than a prima facie showing of liability.'" *Nelson*, 709 F.2d at 680 (citations omitted).

The court in this case plainly violated these principles. In addressing Rule 23(a)'s commonality requirement, the court discussed at length "the relative strength and quality" of evidence supporting plaintiffs' systemic discrimination claims, 205 FRD at 610, and its opinion is replete with judgments on the weight and probative value of plaintiffs' evidence that are within the sole province of the jury. The opinion denying class certification thus demonstrates a clear abuse of discretion in applying Rule 23, and exposes the court's error in granting summary judgment against plaintiffs' systemic claims.

With respect to plaintiffs' statistical evidence, for instance, the court concluded that while the "methodologies" of plaintiffs' expert "may be valid, the analysis has some limitations which undermine its usefulness in measuring whether [SoCo's] employment practices are racially neutral." *Id.* at 613. At the same time, the court rejected some arguments and analysis advanced by SoCo's expert, Dr. Joan Haworth, to counter plaintiffs' statistical proof. For instance, the court rejected SoCo's argument that Dr. Madden improperly lumped together progressive and competitive promotions "because both types of promotions involve evaluative choices by management." *Id.* at 614. Further, while Dr. Haworth's analysis of salary and promotion data included many more variables and concluded that "small gaps" in the promotion rates and compensation of black and white employees "were not statistically meaningful," *id.*, the court found "some truth" in Dr. Madden's response "that the lack of statistical significance was due to the fact that Haworth had 'carved

up' the employees into pools so small that it would be unlikely that the results would be statistically significant." *Id.* In addition, the court found Dr. Haworth's omission of "the so-called 'developmental moves'" from her analysis of promotions "is a factor limiting the usefulness of [her] report to the extent it is intended to prove that [SoCo's] treatment of African-Americans is the same." *Id.* Having reviewed both experts' reports, the court was "left with the impression that there could be some salary gap and promotions gap between African-American and white employees," but found it "impossible to determine what the gaps are, whether they are statistically significant, or whether factors other than race are involved." *Id.* at 614-15.

The Supreme Court's decision in *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), establishes that the district court's "view of the evidentiary value of [plaintiffs'] regression analysis was plainly incorrect." The court's primary criticism of plaintiffs' statistical evidence was a perceived "failure to adequately measure the promotion and compensation experiences of similarly situated employees." 205 FRD at 613. Although Dr. Madden's multi-regression analyses controlled for year, subsidiary, job grade, level of education, years since completing school (as a proxy for time in the labor force), tenure at SoCo, and job function when hired (or in 1995), the court faulted her failure to control for "specific job categories and job progressions," while conceding "it would be very difficult to factor those considerations into a statistical analysis." *Id.* at 614. Having concluded that Dr. Madden did not adequately "account for differences in the type or level of the employees' applied skills," *see McCullers*, 2003 WL 1889275 at *6-*8, the court refused to consider plaintiffs' statistics

"evidence of a pattern and practice of discrimination." 205 FRD at 615.

As in this case, plaintiffs in *Bazemore* claimed systemic race discrimination in compensation and "relied heavily on multiple regression analyses designed to demonstrate that blacks were paid less than similarly situated whites." 478 U.S. at 398. The Supreme Court held a lower court "erred in stating that [plaintiffs'] regression analyses were 'unacceptable as evidence of discrimination,' because they did not include 'all measurable variables thought to have an effect on salary level.' . . . While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be," the Court explained, "it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.'" *Id.* at 400. "Normally, failure to include variables will affect the analysis' probativeness, not its admissibility," unless the regression is "so incomplete as to be inadmissible," an argument SoCo never made. *Id.* & note 10. The Court further emphasized,

> Importantly, it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence. . . . Whether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant. However, as long as the [factfinder] may fairly conclude, in light of all the evidence, that it

> is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail.

Id. at 400-01. The credibility of the parties' experts, and the weight and probative value of their statistical analyses, is for the jury to decide, and plaintiffs' evidence exceeds the legal standards for submission to a jury. *See VisaCheck/Mastermoney Litigation*, 280 F.3d 124, 135 (2d Cir. 2001) ("a district court may not weigh conflicting expert evidence or engage in 'statistical dueling' of experts" in resolving Rule 23 motion).

The district court similarly usurped the jury's function in evaluating plaintiffs' additional evidence of systemic discrimination at SoCo. In finding plaintiffs' evidence of racial animus in SoCo facilities insufficient to establish the commonality required by Rule 23(a), the court improperly discounted the probative value of this evidence to permit an inference of discriminatory motive and to demonstrate managerial indifference to the rights of black employees. The court reviewed documentary, photographic, and testimonial evidence that "at numerous times at various locations knotted rope was present which resembled a noose," and acknowledged that "[t]hese 'nooses' did offend and intimidate some employees, who attributed a racial significance to the nooses." 205 FRD at 615. Citing the "sworn statements of [SoCo] employees [who] . . . disavowed any knowledge of racial meaning or racial animus," *id.*, and "voluminous" memoranda prepared by SoCo during investigations conducted shortly after this lawsuit was filed, *id.* at 615-18, however, the court found it "impossible to say whether *any* of the nooses were made or displayed out of a desire to offend or intimidate African-American employees." *Id.* at 618.

The court also reviewed sworn accounts of "various racial slurs, epithets, jokes, and harassment" in nearly all of the 111 affidavits submitted by prospective class members, and found "the conduct referenced therein are [sic] unacceptable and . . . demeaning to African-Americans." *Id.* at 619. While such evidence of racial hostility is relevant "to determine the existence of a pattern and practice of discrimination," *id.* at note 39, the court improperly discounted its probative value "given the size of [SoCo's] workforce (over 12,000 employees) and the large number of work locations," and therefore concluded that "the noose evidence and evidence of racial slurs, jokes and epithets . . . are inadequate to establish the existence of a pattern and practice of discrimination." *Id.* (footnote omitted).

The court used a similarly inappropriate rationale to reject the anecdotal evidence of discrimination submitted by 111 prospective class members "who recite (in addition to the noose testimony and the racial jokes and slur testimony . . .) their [unsuccessful] efforts to obtain promotions or greater compensation, and their belief that [SoCo has] discriminated against them" based on race. *Id.* at 620. The court remarked that "resolving the validity" of these allegations "would be a fact-intensive process," *id.* at 624, and observed that "111 affiants out of a group of 2400 individuals is too low a proportion to prove a pattern and practice of discrimination." *Id.* at 624.

The district court's treatment of the non-statistical evidence reflects a fundamental misunderstanding of the purpose such evidence serves in proving systemic discrimination. In deciding an employer's liability for systemic discrimination, "the focus is on the broad pattern or practice at issue, not the merits of individual claims." *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1556 (11th

Cir. 1986). The function of offering the testimony of individual employees "about their personal experiences with the company" is to bring the "cold numbers" provided by a statistical analysis "convincingly to life," not to establish an employer's liability for individual claims of discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977); *Kilgo v. Bowman Tansp.* [sic] *Co.*, 789 F.2d 859, 874 (11th Cir. 1986) Plaintiffs' anecdotal evidence far exceeds the quantity submitted in *Teamsters*, where the government introduced testimony "recount[ing] over 40 specific instances of discrimination." *Id.* at 338. The credibility of the testimony offered by these employees, and the weight to be accorded the other evidence of racial hostility at SoCo, are for the jury to resolve at trial, not for the district court to determine at summary judgment, much less on a motion for class certification.

Similarly, the court's failure to grasp the probative significance of uncontested evidence showing a "significantly smaller representation of African-Americans in lower, middle and upper management than exists at non-management levels" at SoCo, 205 FRD at 619, reflects a profound misconception of the law governing statistical proof of systemic discrimination. "[T]his data," the court ruled, "does not in itself show an intent to discriminate." *Id.* The Supreme Court has held otherwise. "Statistics showing racial or ethnic imbalance" in an employer's workforce "are probative in a case such as this one," the Court explained, "because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory [promotion] practices will in time result in [managerial or supervisory ranks] more or less representative of the racial and ethnic composition" of the workforce from which

this staff is promoted. *See Teamsters*, 431 U.S. at 340 n.20 (absent discrimination, hiring practices should be expected to produce a workforce that mirrors the general population).

The court further erred in discounting the probative value of SoCo's documented lack of progress in rectifying racial disparities in pay and promotions, identified by OFCCP, to show "the indifference of [SoCo's] senior management to race discrimination." 205 FRD at 625. Evidence that "changes implemented" under the OFCCP conciliation agreement "did not . . . [close] the salary and promotion gap between Caucasians and African-Americans," and that SoCo's "own self-study ('The Diversity Report Card') was critical of the extent of improvement," the court decided, did not show "the indifference of senior management is at such a level" to support plaintiffs' systemic claims. *Id.* Once again, the district court's view conflicts with Supreme Court precedent. The Court in *Bazemore* considered proof of an employer's history of "salary discrimination, and . . . ineffectual attempts to eradicate it," part of "an impressive array of evidence to support [plaintiffs'] contention that [defendant] engaged in a pattern or practice of discrimination with respect to salaries." 478 U.S. at 401.

Finally, the district court criticized plaintiffs' reliance on Staffing Director Wolf's testimony to show that SoCo's policy permits individual managers, in their discretion, to ignore "numerous, detailed written policies and procedures pertaining to filling job vacancies, making promotions, and determining compensation levels." 205 FRD at 619-20. In the court's view, "Wolf's testimony is more fairly characterized as asserting lack of knowledge," and a "fairer interpretation of the evidence would be that [SoCo has]

numerous written procedures and policies . . . , that there is some variation in the manner in which various managers use these procedures, and that the policies and procedures were never intended (nor could they be) to dictate particular outcomes in individual cases." *Id.* at 620.

It was not the court's role, however, to decide on the "fairest" interpretation of Wolf's (or any other witness's) testimony. Such determinations are a quintessential jury function. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). While a jury might regard the evidence as the district court did, this is certainly not the only permissible view of the record, and certainly not the view most favorable to plaintiffs, as required to sustain summary judgment for SoCo. *See Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51 (2000).

In holding plaintiffs' evidence of systemic discrimination insufficient to go to trial, the district court ignored Supreme Court precedent and imposed a legally unattainable standard to challenge, pursuant to *Hazelwood* and *Watson*, systemic discrimination arising from a policy of affording individual managers unmonitored discretion to engage in subjective decisionmaking.

CONCLUSION

The EEOC urges this Court to reverse the denial of class certification and entry of summary judgment, and direct the court on remand to certify a class under Rule 23(b)(2) to litigate at trial the questions of whether SoCo's pay and promotion policies foster a pattern-or-practice of

disparate treatment, or an adverse disparate impact, against African-Americans, and, if appropriate, to award declaratory, injunctive, and equitable relief.

Respectfully submitted,

_____/s/_____
DORI K. BERNSTEIN, Attorney
NICHOLAS M. INZEO,
Acting Deputy General Counsel
PHILIP B. SKLOVER,
Associate General Counsel
CAROLYN L. WHEELER,
Assistant General Counsel
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed.R.App.P. 32(a)(7)(B), and the length authorized for briefs as amicus curiae by Fed.R.App.P. 29(d). This brief contains 6,993 words.

_____/s/_____
Dori K. Bernstein, Attorney

CERTIFICATE OF SERVICE

I hereby certify that two copies of this brief were mailed, first class, postage prepaid, on this 13th day of June, to the following:

Michael B. Terry
Joshua F. Thorpe
Steven J. Rosenwasser
Bondurant, Mixson
& Elmore, LLP
3900 One Atlantic Center
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309-3417

W. Ray Persons
King & Spaulding
191 Peachtree Street, N.E.
Atlanta, Georgia 30303-1763

Walter Christopher Arbery
Hunton & Williams
600 Peachtree Street, N.E.
Bank of America Plaza,
Suite 4100
Atlanta, Georgia 30308-2216

Johnnie L. Cochran, Jr.
J. Keith Givens
Hezekiah Sistrunk, Jr.
Cochran, Cherry, Givens,
Smith & Sistrunk, P.C.
Suite 800 The Candler Bldg
127 Peachtree Street
Atlanta, Georgia 30303

Stephen William Riddell
Troutman Sanders
Bank of America Plaza
600 Peachtree Street, N.E.
Suite 5200
Atlanta, Georgia 30308-2216

_____/s/_____
Dori K. Bernstein
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
1801 L Street, N.W., Room 7046
Washington, DC 20507
(202)663-4734

42 U.S.C. § 1981. Equal rights under the law

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

---

42 U.S.C.S. § 2000e-2(m)

Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 U.S.C.S. §§ 2000e et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

---

42 U.S.C. § 2000e-5(g)(2)

Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 U.S.C.S. § 2000e-3(a)].

(B) On a claim in which an individual proves a violation under section 703(m) [42 U.S.C.S. § 2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m) § 42 U.S.C.S. § 2000e-2(m)]; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Supreme Court, U.S.
FILED
SEP 15 2005
OFFICE OF THE CLERK

No. 05-88

IN THE

Supreme Court of the United States

CORNELIUS COOPER, *et al.*,

Petitioners,

v.

SOUTHERN COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

W. CHRISTOPHER ARBERY
HUNTON & WILLIAMS
600 Peachtree Street, N.E.
Bank of America Plaza
Suite 4100
Atlanta, GA 30308-2216
(404) 888-4000

STEPHEN W. RIDDELL
Counsel of Record
T. WOOD LOVELL, JR.
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E.
Bank of America Plaza
Suite 5200
Atlanta, GA 30308-2216
(404) 885-3000

Counsel for Respondents

196633

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the District Court's rigorous analysis of Petitioners' evidence does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the District Court's denial of certification of an equitable relief-only class does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

III. Whether Petitioners have presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the District Court's application of the *McDonnell-Douglas* analytical framework does not conflict with a decision of this Court or a Court of Appeals nor does it implicate an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent The Southern Company does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

Respondent Georgia Power Company has the following parent corporation:

The Southern Company.

The Southern Company is the only publicly held company that owns 10% or more of Georgia Power Company's stock.

Respondent Southern Company Services, Inc. has the following parent corporation:

The Southern Company.

The Southern Company is the only publicly held company that owns 10% or more of Southern Company Services, Inc.'s stock.

Respondent Southern Company Energy Solutions, Inc. has the following parent corporation:

Southern Company Holdings, Inc.

No publicly held company owns 10% or more of Southern Company Energy Solutions, Inc.

TABLE OF CONTENTS

Page

Questions Presented i

Corporate Disclosure Statement Pursuant to Supreme Court Rule 29.6 ii

Table of Contents iii

Table of Cited Authorities vii

Introduction 1

Statement of the Case 3

Reasons for Denying the Petition 8

I. The District Court's Denial of Class Certification is Reviewed for Abuse of Discretion 9

II. The District Court Properly Conducted a "Rigorous Analysis" of Petitioners' Evidence 10

A. The Decisions Below Are Entirely Consistent with Eisen and Falcon 10

1. The District Court Was Required to Evaluate Petitioners' Evidence to Determine Whether Petitioners Established Typicality and Commonality 10

Contents

Page

2. The Eleventh Circuit — Like Every Other Circuit — Expressly Prohibits District Courts from Deciding a Case's Merits at the Certification Stage 13

B. The Decisions Below Are Entirely Consistent with Bazemore 13

1. The Lower Courts Did Not "Disregard" Dr. Madden's Expert Report 13

2. The District Court Properly Found that Dr. Madden's Report Did Not Compare Similarly Situated Individuals 14

3. A Circuit Split Does Not Exist ... 16

a. This Court Declined to Review this Issue Last Term 16

b. Petitioners Erroneously Believe that They Have Only a Burden of Production 17

c. The District Court Did Not "Choose Sides" in a Battle of the Experts 19

Contents

Page

d. Petitioners' Non-Statistical Evidence Was Not Sufficient to Support Dr. Madden's Report .. 20

C. The Eleventh Circuit Does Not Apply Different Class Certification and Summary Judgment Standards in Discrimination Cases 20

III. The District Court Did Not Abuse Its Discretion in Declining to Certify an Equitable-Relief Only Class 21

A. Granting Petitioners' Perfunctory Requests for Injunctive and Declaratory Relief Would Have Been Ineffectual .. 21

B. The Named Petitioners Would Not Have Adequately Represented the Putative Class 22

C. Petitioners Completely Ignore the Lower Courts' Significant Seventh Amendment Concerns 23

D. A So-Called "Catch 22" Does Not Exist in the Eleventh Circuit 24

IV. Desert Palace Has No Impact on this Case ... 25

A. Petitioners Have Waived Their Argument that this is a Mixed-Motive Case 25

Contents

Page

B. Desert Palace Did Not Impact the McDonnell Douglas Framework 26

C. Adopting Petitioners' Proposed Analytical Framework Would Not Change the Outcome of this Case 27

D. No Circuit Court Has Found that Desert Palace Altered McDonnell Douglas ... 28

Conclusion 29

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Balderston v. Fairbanks Morse Engine Div. of Coltec Indus., 328 F.3d 309 (7th Cir. 2003) 16

Bazemore v. Friday, 478 U.S. 385 (1986) .. 13, 14, 15, 17

Bolander v. BP Oil Co., 128 Fed. Appx. 412 (6th Cir. 2005) 25

Bryant v. Aiken Regional Med. Centers, Inc., 333 F.3d 536 (4th Cir. 2003) 28

Califano v. Yamasaki, 442 U.S. 682 (1979) 9

Carter v. Univ. of Toledo, 349 F.3d 269 (6th Cir. 2003) 28

Cerutti v. BASF Corp., 349 F.3d 1055 (7th Cir. 2003) 28

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 10, 11

Desert Palace v. Costa, 539 U.S. 90 (2003) 2, 26, 27, 28, 29

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 10, 11, 12

Gariety v. Grant Thornton, LLP, 368 F.3d 356 (4th Cir. 2004) 12

Cited Authorities

Page

General Telephone Company of the Southwest v. Falcon, 457 U.S. 147 (1982) 11, 17, 20

Golden v. City of Columbus, 404 F.3d 950 (6th Cir. 2005) 17

Grosz v. The Boeing Co., No. 04-55428, 2005 WL 1515070 (9th Cir. June 28, 2005) 21

Hillstrom v. Best Western TLC Hotel, No. 03-1972, 2003 WL 23095252 (1st Cir. Dec. 31, 2003) ... 28

Hilton v. Wyman-Gordon Co., 624 F.2d 379 (1st Cir. 1980) 18

Johnson v. California, 125 S. Ct. 2410 (2005) 27

Jones v. Barnhart, 349 F.3d 1260 (10th Cir. 2003) .. 28

Keelan v. Majesco Software, Inc., 407 F.3d 332 (5th Cir. 2005) 29

Kern v. TXO Prod. Corp., 738 F.2d 968 (8th Cir. 1984) 9

Lott v. Westinghouse Savannah River Co., Inc., 200 F.R.D. 539 (D. S.C. 2000) 20

Love v. Turlington, 733 F.2d 1562 (11th Cir. 1984) 11, 13

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..... *passim*

Cited Authorities

Page

Minority Employees of the Tennessee Dept. of Employment Security, 878 F.2d 1436, No. 88-5429, 1989 WL 74523 (6th Cir. July 10, 1989) 18

Morgan v. United Parcel Service of America, 380 F.3d 459 (8th Cir. 2004), *cert denied*, 125 S. Ct. 1933 (U.S. Apr. 25, 2005) 16, 17

Penk v. Oregon State Bd. of Higher Educ., 816 F.2d 458 (9th Cir. 1987) 17, 18

Penson v. Terminal Transp. Co., 634 F.2d 989 (5th Cir. 1981) 23

Peterson v. Hewlett-Packard Co., No. 01-35795, 2004 WL 26580 (9th Cir. Jan. 6, 2004) 28

Phillips v. Cohen, 400 F.3d 388 (6th Cir. 2005) ... 19

Porter v. Natsios, 414 F.3d 13 (D.C. Cir. 2005) ... 28

Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) .. 27

Read v. BT Alex Brown, Inc., 72 Fed. Appx. 112 (5th Cir. 2003) 28

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 9

Ross v. Bernhard, 396 U.S. 531 (1970) 24

Salis v. University of Minnesota, 408 F.3d 470 (8th Cir. 2005) 25

Cited Authorities

Page

Sheehan v. Purolator, Inc., 839 F.2d 99 (2d Cir. 1988) 18

Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011 (8th Cir. 2005) 28

Taylor v. Cherry Hill Bd. Of Educ., No. 02-3738, 2004 WL 52083 (3rd Cir. Jan. 13, 2004) 28

Terry v. Ashcroft, 336 F.3d 128 (2nd Cir. 2003) ... 28

Trammel v. Simmons First Bank, 345 F.3d 611 (8th Cir. 2003) 28

United States v. Bean, 537 U.S. 71 (2002) 25

Zachary v. Texaco Exploration & Prod., Inc., 185 F.R.D. 230 (W.D. Tex. 1999) 22

OTHER AUTHORITIES

42 U.S.C. § 2000e-2(m) 25, 26

Fed. R. App. P. 35(a)(1) 20-21

Fed. R. Civ. Proc. 23 ..... *passim*

Sup. Ct. R. 10 ..... 1, 9

U.S. Const. amend VII 2, 24

INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for a Writ of *Certiorari* to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that the Eleventh Circuit's November 10, 2004 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Eleventh Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). In fact, Petitioners (who only make half-hearted attempts to demonstrate that a Circuit split exists) have not even carried their significantly less strenuous burden of showing that the District Court's denial of class certification was an abuse of discretion — which would, in any event, constitute insufficient grounds to grant the Petition. *See id.* Therefore, the Petition should be denied.

At the outset, Petitioners contend that the Eleventh Circuit's Opinion creates a Circuit split because it allows district courts to rule on the merits of a case at the class certification stage. This argument, however, is belied by the plain language of the Eleventh Circuit's Opinion *in this case*: "a trial court may not properly reach the merits of a claim when determining whether class certification in warranted . . ." Thus, the Eleventh Circuit — like every other Circuit — prohibits district courts from deciding the merits of a case at the class certification stage.

Petitioners also claim that the Eleventh Circuit's Opinion creates a Circuit split because it permits courts to deny class certification, despite the existence of an "admissible, methodologically valid regression analysis." No Circuit, however, has adopted Petitioners' erroneous belief that they have only a burden of production (not persuasion) at the certification stage. Indeed, the First, Second, Sixth, and Ninth Circuits — whose decisions Petitioners claim are in conflict with the law of the Eleventh Circuit — have all found that *admissible* statistics may be *insufficient* to satisfy the plaintiffs' burden of persuasion at the certification or merits stages.

Further, Petitioners' contention that the district court should have certified an "equitable relief only class" is not properly before this Court because Petitioners never actually dismissed their claims for compensatory and punitive damages. Regardless, Petitioners — who merely made generic, perfunctory requests for injunctive relief — would have been inadequate representatives of the putative class because the members of the class would have been precluded from recovering compensatory and punitive damages in the event the District Court had certified Petitioners' claims for equitable relief-only. Moreover, Petitioners have made no effort to address the concerns of both of the courts below that certifying an equitable relief-only class would have likely run afoul of the Seventh Amendment to the United States Constitution.

Finally, Petitioners' far-fetched contention that this Court's decision in *Desert Palace* overruled its seminal decision in *McDonnell Douglas* is utterly without merit. This Court did not even *mention McDonnell Douglas* in *Desert Palace*, and it has continued to rely on the *McDonnell Douglas* analytical framework since *Desert Palace* was decided. Moreover, no Circuit Court has held that *Desert Palace* abrogated *McDonnell Douglas*, and the vast majority of district courts have held that *Desert Palace* did not impact *McDonnell Douglas* in any way. Therefore, this is essentially a "settled" issue that does not merit this Court's attention. Even if this Court were inclined to address this issue, this case does not present such an opportunity because Petitioners never proffered a shred of evidence that race was a motivating factor in any of the employment decisions at issue.

Simply put, Petitioners have failed completely to carry their burden of demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

The three different companies involved in this case — GPC, SCS and SCES (the "Companies" or the "Respondents") — conduct an extremely wide variety of operations and functions at more than 200 different locations in several different states to serve customers in the electric utility industry.[1] (R136 V.3 Tab 27: 9-28). The Companies employ individuals in a wide variety of positions, ranging from entry-level, non-skilled laborer positions to upper-level management. (Pet. App. at 297a-298a). The Companies employ exempt and non-exempt employees, supervisory and non-supervisory employees, and employees whose pay and other terms and conditions of employment are strictly governed by a collective bargaining agreement ("CBA") with a union. (Pet. App. at 297a-298a). The wide disparity among the Companies and their myriad employees are well documented in the record. (*See* Pet. App. at 6a ("the differences in management structures, working environments, and criteria for employment decisions vary substantially among the defendant companies")).

Even *within* each of the Companies, the employment structures vary significantly. For instance, with respect to GPC, the Eleventh Circuit observed that:

> GPC's operations are extremely diversified, and its facilities, workforce, and management are dispersed across the entire state of Georgia. Certain functions within GPC are divided among different regions in the state, and widely divergent operating and management structures exist within different regions. Thus, for example, GPC's Customer Operations function across 16 regions that have very different workforces. The expansive and rural Southeast Region has very different characteristics with respect to technology, customer service, and distribution capacity than does the

1. The Southern Company is a holding company which has no employees. (Pet. App. at 296a).

> metropolitan Atlanta region, a dense and highly-populated area that includes numerous commercial clients.

(Pet. App. 5a). Simply put, "the workforces within the different Companies are strikingly different." (Pet. App. at 7a). Petitioners have not challenged these facts at any stage of this case.

Despite these significant variations between (and within) the Companies, Petitioners have attempted to portray decision-making on personnel matters at the Companies as "common pay and promotion polices" that can be challenged on a class-wide basis.[2] (*See* Pet. App. at 4). In actuality, there are a number of different types of employment decisions at issue, and the Companies employ a variety of different processes and procedures to make these employment decisions. (*See* Pet App. at 7a). For example, in the area of compensation, pay rates and other terms of compensation for union positions are dictated exclusively by the CBA, so managers have no discretion in setting those wages. (Pet. App. at 7a). In some business units, employees whose jobs are not covered by a CBA are compensated under special compensation and bonus plans that are unique to their business units. (R136 V.3 Tab 38: ¶ 34). Other employees are eligible for merit increases and incentive bonuses each year, but managers in different business units at different companies use different processes to make those decisions. (R135: 16-19).[3] There are also a wide variety of

2. Specifically, Petitioners allege that there are "common promotion and compensation policies and practices, which give managers unfettered discretion to make subjective, non-job-related decisions, foster a pattern or practice of discrimination or have a disparate impact on black employees." (*See* Pet. App. at 4).

3. For instance, some managers allocate the same percentage merit increases to all employees — except those whose performance is extraordinarily good or bad. (R136 V.3 Tab 30: ¶ 19). Some managers rate and rank employees, then develop merit raise clusters and assign the same percentage increases to each cluster. (R136 V.4 Tab 60: ¶ 30). (Cont'd)

different approaches used to determine incentive pay awards. (R135: 18-19).

With respect to promotion decisions, there are a number of different types of promotions available to employees. (R135: 11-16). For instance, there are competitive promotions in which a job is posted on an electronic computer system (which is available to all employees) and candidates compete for the posted job through competitive interviews. (R136 V.3 Tab 31: ¶ 8; Tab 36: ¶ 9; Tab 41: ¶ 20; Tab 43: ¶¶ 12-13; Tab 45: ¶ 15; Tab 47: ¶ 13). There are job vacancies under the CBA that are filled via seniority under the provisions of the CBA. (R136 V.1 Tab 20: ¶¶ 7-8). There are "progressive" promotions, in which an employee is advanced within the same salary grade on a non-competitive basis when he or she accomplishes certain pre-determined goals or milestones associated with the job family (or he or she demonstrates satisfactory performance over a sustained period). (Pet. App. at 301a). Jobs are also sometimes filled through developmental moves, job rotations and reorganizations. (R135: 15-16).

While decisions are made by different managers in different departments using different methods,[4] the Companies have implemented a number of policies and procedures to help managers make sound decisions based on job-related factors. (Pet. App. at 8a). For example, discrimination on the basis of race (or any other protected class) is strictly prohibited at the

---

(Cont'd)

Other managers focus on achievement of departmental goals and individual goals, as well as their organization's pay philosophy (which varies from organization to organization). (R136 V.3 Tab 42: ¶ 17).

4. For non-unionized workers, "hiring and promotion decisions are made by managers of various rank based in geographically dispersed facilities within each of the defendant companies. Different managers assign various weights to different qualifications in making their employment decisions, and managers have the discretion to utilize a wide range of processes and procedures when making compensation and promotion decisions." (Pet. App. at 7a).

Companies. (R136 V.3 Tab 27:2-6 and Exs. A-G). The Companies also go to great lengths to "promote compliance with all EEO policies and anti-discrimination laws" and to "address workforce diversity." (*See* Pet. App. at 9a) (describing various measures the Companies have implemented, such as affirmative action plans and training programs)). In addition, managers are provided with tools and resources to use in making promotion and compensation decisions based on legitimate, non-discriminatory factors.[5] In sum, there are no "common promotion and compensation policies and practices" that "foster a pattern or practice of race discrimination or have a disparate impact on black employees." (Pet. App. at 4).

Despite these facts, on July 27, 2000, Petitioners filed suit against Respondents, alleging that the Companies unlawfully discriminated against all of their African-American employees on account of their race.[6] (Pet. App. at 2a). Petitioners alleged

---

5. Human Resources personnel provide substantial guidance and tools for managers to use in filling job vacancies and determining employees' compensation. For instance, managers are provided with Structured Interview Guidelines (which contain a list of proposed job-related questions for each behavioral trait required for the job and tools for evaluating responses to those questions) and HR representatives frequently facilitate the meetings of job selection committees. (R135: 11-16). Similarly, managers receive general guidance from the Compensation Department and senior management regarding how to set salaries, merit increases and bonuses for non-covered employees. For instance, absent very unusual circumstances, managers are instructed that an employee's salary should fall within 80% to 120% of the midpoint of the salary range for his or her job grade. (R135: 16-19).

6. In the Petition, Petitioners try to support their claims by cites to purported evidence that is taken completely out of context. This "evidence" includes such things as a diversity scorecard document, testimony of a low level, former human resources employee and some vague, non-specific affidavits, purportedly containing anecdotal evidence of discrimination. (*See* Pet. App. at 4-6). When the Court views this evidence in context, none of the evidence remotely supports Petitioners' claims. (*See, e.g.*, R135: 28-29, 30 n. 17, 59 n. 40; R136 V. 1, Tab 18).

that Respondents discriminated against them in connection with promotion opportunities and performance evaluations, as well as in terms of compensation. (Pet. App. at 3a). Petitioners sought to represent a Rule 23 class that they described in the following terms:

> All African-American persons employed by Southern Company's Corporate Office, Georgia Power Company, Southern Company Services, Inc. or Southern Company Energy Solutions, Inc., in the United States at any time from July, 1998 to the present, who are subject to the Defendants' employment, personnel and human resources policies and practices and who have been, continue to be, or may in the future be adversely affected by the Defendants' racially discriminatory employment policies and practices.

In the Eleventh Circuit's view, this was a "very broad class" which "included approximately 2,400 individuals residing in Georgia, Alabama, Florida, and Mississippi, and working at locations dispersed throughout the four states." (Pet. App. at 3a, 28a). Indeed, the class encompassed all types of employees ranging from entry-level manual laborers to skilled professionals, exempt and non-exempt employees, and unionized and non-unionized workers. (Pet. App. 3a).

After extensive discovery was conducted, the District Court denied Petitioners' Motion for Class Certification. Specifically, the District Court found that Petitioners had not satisfied three of the four basic requirements of Federal Rule of Civil Procedure 23(a).[7] (Pet. App. at 324a-326a, 366a-367a). Alternatively, the

---

7. Rule 23(a) provides that,

> [o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of

(Cont'd)

District Court held that Petitioners failed to establish that certification was appropriate under Rule 23(b)(2) or (b)(3).[8] (Pet. App. at 372a, 376a-377a). The District Court subsequently granted Respondents' Motions for Summary Judgment as to each individual claim raised by each of the named Petitioners. (Pet. App. at 2a). The Eleventh Circuit affirmed the District Court's judgments in all respects. (Pet. App. at 2a).

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly,

---

(Cont'd)

> the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

These four requirements are referred to as numerosity, commonality, typicality, and adequacy.

8. Rule 23(b) provides in pertinent part, that:

> [a]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. *The District Court's Denial of Class Certification is Reviewed for Abuse of Discretion*

District courts "have broad power and discretion vested in them by Fed. Rule Civ. Proc. 23 with respect to matters involving the certification and management of . . . class actions." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979). As a result, the denial of class certification is reviewed for abuse of discretion. *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). This highly deferential standard of review allows "a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." (Pet. App. at 21a.); *see Kern v. TXO Prod. Corp.*, 738 F.2d 968, 971 (8th Cir. 1984) (abuse-of-discretion review "presupposes a zone of choice within which the trial courts may go either way"). Accordingly, even if this Court would have certified a class, "that does not mean the district court abused its discretion in declining to do so." (Pet. App. at 21a). While the denial of certification is reviewed for abuse of discretion, Petitioners must also carry their significantly more strenuous burden of demonstrating that there are compelling reasons to grant the Petition. *See* Sup. Ct. R. 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Petitioners have not carried their burden because this is simply an unremarkable case in which the District Court exercised its considerable discretion under Rule 23 not to certify a class.

II. *The District Court Properly Conducted a "Rigorous Analysis" of Petitioners' Evidence*

A. The Decisions Below Are Entirely Consistent with *Eisen* and *Falcon*

1. *The District Court Was Required to Evaluate Petitioners' Evidence to Determine Whether Petitioners Established Typicality and Commonality*

In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), this Court held that the district court had erred by holding a preliminary hearing on the merits of the plaintiff's claims at the class certification stage, because "[n]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 177. Petitioners contend that the District Court violated *Eisen* by "requiring Plaintiffs to 'convince the Court' of the merits of their case at the class certification stage."[9] (*See* Pet App. 7-9).

Petitioners' invocation of *Eisen*, however, is simply a desperate attempt to divert this Court's attention from this Court's post-*Eisen* explanation that evidence pertaining to Rule 23's requirements is often intertwined with the merits, "making it impossible to meaningfully address the Rule 23 criteria without at least touching on the 'merits' of the litigation." (*See* Pet. App. at 22a (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n. 12 (1978) ("evaluation of many of the questions entering into determination of class action questions is *intimately involved with the merits of the claims*")) (emphasis added)). In fact, four years after *Coopers & Lybrand* was decided, this Court held that district courts are *required* to conduct a "rigorous analysis" of the evidence to determine

---

9. The Eleventh Circuit rejected Petitioners' contention that the District Court conducted a merits inquiry. (Pet App. at 22a-23a).

whether the plaintiffs have satisfied the elements of Rule 23(a). *See General Telephone Company of the Southwest v. Falcon* 457 U.S. 147, 161 (1982) ("a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied").[10]

In light of this Court's jurisprudence since *Eisen*, the Eleventh Circuit has cautioned that

> while it is true that a trial court may not properly reach the merits of a claim when determining whether class certification is warranted, this principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements.

(*See* Pet. App. at 22a (quoting *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984))). Unfortunately, this is precisely the misguided strategy Petitioners advance in their Petition.

In this case, the District Court properly conducted a rigorous analysis of Petitioners' evidence for the sole purpose of determining whether Petitioners established commonality and typicality under Rule 23(a). (*See* Pet. App. at 323a-367a). Naturally, some of this evidence was intertwined with the evidence Petitioners would have used to prove the merits of their case. *See Coopers & Lybrand*, 437 U.S. at 469 n. 12. As the Eleventh Circuit reasoned, however, this was not an abuse of discretion — as the District Court was *required* to perform this analysis pursuant to *Falcon*:

> the district court was obliged to make some preliminary assessment of the plaintiffs' evidence to determine, at

---

10. Tellingly, Plaintiffs do not even *cite Falcon* — the seminal, "controlling case . . . interpreting Rule 23's requirement of commonality." (Pet. App. at 362a).

> the very least, whether the named plaintiffs were claiming discrimination that was *common* to the members of the putative class. Indeed, the district court would have erred if it had certified a class without first determining that the named plaintiffs had claims common to those of the unnamed class members.

(Pet. App. at 23a) (emphasis in original).

At best, Petitioners' argument amounts to an exercise in semantics. The District Court's mere use of the words "convince" and "establish" does not demonstrate that it conducted a merits inquiry. (*See* Pet. App. at 8; Pet. App. at 324a ("with respect to Named Plaintiffs Cooper, Green, McCullers and Wilson, the Court is *unconvinced* that they have claims typical of the class as a whole. No factual showing has been made in this regard")) (emphasis added). Moreover, Petitioners' inexplicable reliance on the following excerpt from the District Court's Order only serves to confirm that the Court ruled on the elements of Rule 23(a) — *not* the merits of Petitioners' claims: "it is important to focus on the relative strength and quality of that evidence to determine if it is *strong enough to provide the element of commonality needed for class certification.*" (*See* Pet. App. at 8 (quoting Pet. App. at 367a)) (emphasis added). Accordingly, Petitioners have not shown that the District Court's rigorous analysis of Petitioners' evidence was in error (let alone an abuse of discretion). *See Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) ("*Eisen*'s prohibition against assessing plaintiffs' likelihood of success on the merits as part of a Rule 23 certification does not mean that consideration of facts necessary to a Rule 23 determination is foreclosed merely because they are required to be proved as part of the merits").

2. *The Eleventh Circuit — Like Every Other Circuit — Expressly Prohibits District Courts from Deciding a Case's Merits at the Certification Stage*

Petitioners erroneously claim that the Eleventh Circuit's decision conflicts with the law of the Second and Fourth Circuits, which prohibit district courts from making a merits determination at the certification stage. (*See* Pet. App. at 10). As demonstrated above, the Courts below did *not* inquire into the merits of Petitioners' claims, but rather they evaluated whether Petitioners had satisfied the requirements of Rule 23(a). (*See* Pet. App. at 26a-37a; 323a-367a). Indeed, this Court need look no further than the plain language of the Eleventh Circuit's Opinion *in this case* to determine that there is no Circuit split on this issue: "a trial court *may not properly reach the merits of a claim* when determining whether class certification in warranted . . ." (*See* Pet. App. 22a) (emphasis added); *see also Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984). This is the unambiguous law of the Eleventh Circuit, which is in harmony with the law of this Court and all other Circuits.

B. The Decisions Below Are Entirely Consistent with *Bazemore*

1. *The Lower Courts Did Not "Disregard" Dr. Madden's Expert Report*

In *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), this Court held that a statistical analysis should not be excluded from evidence merely because it fails to incorporate every possible variable. Petitioners repeatedly contend that the decisions below are in conflict with *Bazemore* because the Courts "disregarded" the expert report of Petitioners' expert Dr. Janice Madden. (*See* Pet. App. at 11-13). Petitioners' contention is a complete mischaracterization of the record. The District Court — which held that Dr. Madden's Report was *admissible* — spent *ten pages* conducting a painstaking, thorough analysis of Dr. Madden's Report. (*See* Pet. App. at 327a-337a). Specifically, the District

Court analyzed Dr. Madden's methodologies, her definitions, the factors she considered, and her conclusions — eventually determining that the Report was not sufficiently probative to establish that the named Petitioners had claims in common with other class members.[11] (Pet. App. at 327a-337a). The Eleventh Circuit spent six pages conducting an equally thorough analysis of the Report's probativeness. (*See* Pet. App. at 31a-36a). Thus, the analysis by the lower Courts is entirely consistent with *Bazemore*'s pronouncement that the "failure to include variables will affect the analysis' probativeness, not its admissibility." *See id.* at 400.

2. *The District Court Properly Found that Dr. Madden's Report Did Not Compare Similarly Situated Individuals*

Petitioners further contend that the decisions below "also conflict[ ] with *Bazemore* by disregarding Dr. Madden's Report based on speculation that some other variables *might* affect the analyses." (*See* Pet. App. 13) (emphasis in original). Again, this is a mischaracterization of the record. In actuality, the District Court determined that the variables Dr. Madden *actually considered* were flawed, and that, as a result, she "fail[ed] to adequately measure the promotion and compensation experiences of similarly situated employees." (*See* Pet. App. 333a).

Specifically, the District Court found that the Madden

---

11. According to the Eleventh Circuit,

> [t]he district court did not exclude Dr. Madden's reports because she was unqualified or because the reports were based on a wholly unreliable methodology; rather, the court accepted the reports' conclusions but determined that they still failed to establish that the named plaintiffs had claims in common with other class members under either a pattern and practice or disparate impact theory.

(*See* Pet. App. 32a).

Report suffered from the following material flaws:[12] (i) Madden's definition of "experience" meant only the amount of time that had elapsed since finishing school and the amount of time the individual had been on Respondents' payroll — there was no consideration of such factors as type or level of acquired skills, "both of which are highly related to promotions and level of compensation"; (ii) Madden did not compare outcomes for employees who had *actually applied* for posted positions; (iii) Madden did not distinguish between competitive and progressive promotions; (iv) Madden's definition of "education" did not account for field of study, the relevance of that field to any position in question, or the quality of the educational institutions involved; and (v) Madden's analysis of promotions was not tailored to the decision-making process Respondents actually used. (Pet. App. at 333a-337a).

Likewise, the Eleventh Circuit found that Dr. Madden's Report contained numerous "substantial analytical flaws." (*See* Pet. App. at 30a). According to the Eleventh Circuit, "the Madden reports did not make any reference to any of the specific named plaintiffs or their specific similarly-situated comparators, making it altogether unclear how the reports could establish *commonality* among these named plaintiffs' claims and the overall claims of the affected class." (*See* Pet. App. at 35a) (emphasis in original).

Because Dr. Madden did not compare similarly situated individuals, the District Court found that her Report was insufficient to demonstrate that the named Petitioners' claims were common to the class under either a disparate impact or a

---

12. Petitioners' suggestion that Dr. Madden controlled for "more variables than this Court held were necessary in *Bazemore*" is immaterial because *Bazemore* dealt with the admissibility (not weight) of expert reports. (Pet. App. at 13); *Bazemore*, 478 U.S. at 400. Regardless, given that Dr. Madden failed to compare similarly situated individuals, the total number of variables that were supposedly included in her analysis is inconsequential.

disparate treatment theory.[13] (*See* Pet. App. 333a). Given the Report's "substantial analytical flaws", this finding was not an abuse of discretion. *See Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 319-20 (7th Cir. 2003) ("[t]he Supreme Court has emphasized the importance of looking to the proper base 'group' when making statistical comparisons and examining all of the surrounding facts and circumstances which create the statistics themselves").

3. *A Circuit Split Does Not Exist*

Petitioners contend that the Eleventh Circuit's Opinion creates a Circuit split with the First, Second, Sixth, and Ninth Circuits on the ground that it impermissibly allows district courts "to choose sides in a battle of experts and to decide that Rule 23 is not satisfied based on a finding that an admissible, methodologically valid regression analysis does not provide sufficiently strong evidence of discrimination because the court speculates the analysis should have included additional variables." (*See* Pet. App. at 16). Petitioners' argument fails for the reasons discussed below.

a. *This Court Declined to Review this Issue Last Term*

Last term, this Court declined to review an Eight Circuit decision in which the plaintiffs' multiple regression analyses were deemed to be insufficient to create a triable case of pattern-or-practice discrimination because the regressions "fail[ed] to take into account past pay, performance, or both." *See Morgan v. United Parcel Service of America*, 380 F.3d 459, 468 (8th Cir. 2004), *cert denied*, 125 S. Ct. 1933, 161 L. Ed. 2d 773 (U.S. Apr. 25, 2005) (No. 04-1123). No significant legal

13. Even according to Dr. Madden's Report, only three of 148 pools she analyzed showed a representational deficiency of African-Americans. (Pet. App. 336a). The District Court concluded that this evidence may demonstrate that promotional deficiencies for African-Americans may have existed only in some segments of the workforce, not throughout the entire class. (Pet. App. 336a).

developments have taken place since this Court denied the Petition for a Writ of *Certiorari* in *Morgan*. Accordingly, the Petition should be denied for this reason alone.

b. *Petitioners Erroneously Believe that They Have Only a Burden of Production*

Petitioners' main complaint — *i.e.*, that the District Court was not permitted to deny certification once Petitioners presented an "admissible, methodologically valid regression analysis" — reveals a fundamental misunderstanding of *Bazemore*, *Falcon*, and ultimately, Rule 23. (Pet. App. at 16). Petitioners erroneously seem to believe that they have a burden of production (not persuasion) at the class certification stage. *See Falcon*, 457 U.S. at 156, 161 (plaintiffs have burden of satisfying Rule 23's prerequisites); *Golden v. City of Columbus*, 404 F.3d 950, 965 (6th Cir. 2005) ("[a]s the party seeking class certification, [the plaintiff] bears the burden of proof"). Petitioners were required to do significantly more than merely *produce* an admissible expert report. Indeed, Petitioners (through the use of statistics and other evidence) had the burden of *persuading* the Court that they satisfied the requirements of Rule 23(a).[14] (*See* Pet. App. 35a n. 11 (*Bazemore* "did not hold that any statistical report, no matter how many critical variables were missing, should automatically present a jury question . . .")); *Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 465 (9th Cir. 1987) ("[w]e note that by finding fault and infirmities in the statistical evidence presented, the district judge was neither evading her responsibility to examine the evidence, nor placing impossible burdens on the plaintiffs. The judge was

---

14. Taken to its logical extreme, Petitioners' argument would have this Court hold that certification is *mandatory* whenever a plaintiff presents an admissible statistical analysis. (Pet. App. at 16). *Falcon*'s directive that district courts conduct a "rigorous analysis" of the evidence, however, completely undermines Petitioners' contention that the district court was bound to accept their allegations and statistical materials at face-value and thereby rubber-stamp their Motion for Class Certification. *See Falcon*, 457 U.S. at 161.

simply unpersuaded"). Petitioners did not satisfy their burden of persuasion.

Further, Petitioners' contention that the Eleventh Circuit's Opinion creates a Circuit split is incorrect because *no* Circuit has held that the plaintiff has only a burden of production at the certification stage. In fact, the First, Second, Sixth, and Ninth Circuits — whose decisions Petitioners claim are in conflict with the law of the Eleventh Circuit — have all found that *admissible* statistics were *insufficient* to satisfy the plaintiffs' burden of persuasion at the certification or merits stages. *See, e.g., Hilton v. Wyman-Gordon Co.*, 624 F.2d 379, 381-82 (1st Cir. 1980) (affirming judgment in favor of defendant as to plaintiffs' disparate treatment claims where admissible statistical evidence was "ambiguous"); *Sheehan v. Purolator, Inc.*, 839 F.2d 99, 102 (2nd Cir. 1988) (affirming denial of class certification where district court determined that statistics "did not provide relevant comparisons of males and females with the same qualifications and experience, nor did the statistics alone indicate that other female employees felt aggrieved"); *Minority Employees of the Tennessee Dept. of Employment Security*, 878 F.2d 1436, No. 88-5429, 1989 WL 74523, *2-3 (6th Cir. July 10, 1989) (affirming dismissal of class action disparate impact claims where district court found "plaintiffs' statistical evidence failed to accurately reflect those employees interested in and qualified for promotion. Furthermore, plaintiffs' statistical evidence failed to indicate the racial composition of the pool of employees seeking placement on the promotional register and failed to restrict itself to actual applicants who were qualified for promotion"); *Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 465 (9th Cir. 1987)

> [t]he district court concluded that variables missing from the [statistical] model must have had a significant influence on salary and advancement decisions . . . [W]e hold that the district court did not clearly err in concluding that the plaintiffs failed to establish the

> existence of actionable discrimination by a preponderance of the evidence.

Therefore, it is clear that the Eleventh Circuit's Opinion does not create a Circuit split.[15]

c. *The District Court Did Not "Choose Sides" in a Battle of the Experts*

Finally, Petitioners' suggestion that the District Court "cho[se] sides in a battle of the experts" is yet another mischaracterization of the Court's Order. (*See* Pet. App. at 16). The District Court did not conduct a comparative analysis of the two reports nor did it determine that Dr. Haworth's Report was more persuasive or credible than Dr. Madden's. (*See* Pet. App. at 327a-337a); *see, e.g.*, *Phillips v. Cohen*, 400 F.3d 388, 399 (6th Cir. 2005) (reversing magistrate judge's grant of summary judgment where lower court "found [the defendant's expert's] conclusions *more credible*. This approach of weighing the credibility of the competing expert reports amounts to improper fact-finding") (emphasis added). Rather, the District Court simply determined that Dr. Madden's Report has "some limitations which undermine its usefulness in measuring whether Defendants' employment practices are racially neutral." (*See* Pet. App. at 333a). Indeed, the District Court observed that there were certain factors that likewise "limit[ed] the usefulness of Haworth's Report." (Pet. App. at 336a). Therefore, it is readily apparent that a battle of the experts did not take place. (*See* Pet App. at 14-15 (citing *Phillips*, 400 F.3d at 399)).

---

15. Petitioners' contention that the District Court's summary judgment rulings "depended on" its supposed "rejection" of the statistical evidence is simply not true. The District Court held that even if Petitioners' statistics were sufficient to establish a statistically significant disparity, Petitioners still had not established the existence of a causal nexus between the disparity and a specific, facially neutral employment practice. (*See e.g.*, Pet. App. at 162a) Thus, Petitioners' claims would have been dismissed even if the Court had found the existence of a statistically significant disparity.

d. *Petitioners' Non-Statistical Evidence Was Not Sufficient to Support Dr. Madden's Report*

Even if the District Court somehow abused its discretion by not giving enough weight to Dr. Madden's Report (which it did not), the Petition still should be denied because the District Court found that the anecdotal evidence Petitioners presented — which is necessary to support even the most probative statistical evidence — likewise was not sufficient to establish commonality. (*See* Pet. App. at 337a-367a); *Lott v. Westinghouse Savannah River Co., Inc.*, 200 F.R.D. 539, 553 (D. S.C. 2000) ("the Supreme Court in *Falcon* made clear that statistics alone were insufficient to carry the plaintiff's burden under a Rule 23(a) certification for 'pattern and practice' claims"). Petitioners do not claim that the District Court's analysis of their non-statistical evidence was flawed in any way. Therefore, the Petition should be denied for this additional reason.

C. The Eleventh Circuit Does Not Apply Different Class Certification and Summary Judgment Standards in Discrimination Cases

Petitioners claim that the Eleventh Circuit applies heightened requirements at the class certification stage in employment discrimination cases by requiring plaintiffs to prove the merits of their case. (*See* Pet. App. at 18-21). Petitioners' contention, however, is belied by the plain language of the Eleventh Circuit's Opinion in *this* case: "a trial court *may not properly reach the merits of a claim* when determining whether class certification in warranted . . ." (*See* Pet. App. at 22a) (emphasis added). Further, Petitioners have not even attempted to explain how the Eleventh Circuit's alleged heightened summary judgment standards impacted the dismissal of their individual claims. (*See* Pet. App. 20-21).

Even if those so-called double-standards exist (which they do not), it is the province of the Eleventh Circuit, not this Court, to remedy inconsistencies within its caselaw. *See* Fed. R. App.

P. 35(a)(1) (*en banc* rehearing may be granted by Court of Appeals if it is "necessary to secure or maintain uniformity of the court's decisions"). Accordingly, these alleged double-standards are both non-existent and immaterial.

III. *The District Court Did Not Abuse Its Discretion in Declining to Certify an Equitable-Relief Only Class*

There is no need for this Court to reach this issue because the District Court did not abuse its discretion in determining that Petitioners failed to satisfy the elements of Rule 23(a). *See* Fed. R. Civ. P. 23(b) (plaintiff must meet all four of the requirements of Rule 23(a) *and* at least one requirement of Rule 23(b)); *Grosz v. The Boeing Co.*, No. 04-55428, 2005 WL 1515070, *2 (9th Cir. June 28, 2005) ("[b]ecause we find that the requirements of Rule 23(a) are not met, we need not reach the question of whether the proposed class satisfies, in addition, one of the requirements of Rule 23(b)). Even if this Court is inclined to consider Petitioners' Rule 23(b)(2) argument, the Petition should be denied because Petitioners have not carried their burden of demonstrating that the District Court abused its discretion by declining to certify an equitable relief-only class.

A. Granting Petitioners' Perfunctory Requests for Injunctive and Declaratory Relief Would Have Been Ineffectual

Petitioners contend that the District Court abused its discretion by declining to certify "an equitable relief only class." (Pet. App. at 22-24). Petitioners, however, *never actually dismissed their claims for compensatory and punitive damages.* Therefore, Petitioners' contention merely presents a hypothetical scenario that is not properly before this Court.

Regardless, certifying an equitable relief-only class would have been ineffectual because Petitioners merely made generic, perfunctory requests for injunctive relief. Indeed, as the District Court observed: "Plaintiffs have given the Court little information as to what sort of injunctive or declaratory relief

would be of such clear importance as to warrant a determination that equitable issues predominate over the issues of damages." (Pet. App. at 370a; *see also* Pet. App. at 40a n. 13 ("the declaratory and injunctive relief plaintiffs seek amounts, in essence, to an order stating that the defendants discriminated against African-American employees, and enjoining them from discriminating in the future")). Accordingly, given that Petitioners failed to dismiss their claims for damages and they failed to even specify the injunctive relief they were seeking, it could not possibly have been an abuse of discretion for the District Court to decline to certify an equitable-relief only class.

B. The Named Petitioners Would Not Have Adequately Represented the Putative Class

To the extent the named Petitioners were willing to forego class certification on damages in order to pursue equitable only relief under Rule 23(b)(2), the Courts below determined that "it is far from clear that the named plaintiffs would adequately represent the interests of the other putative class members." (Pet. App. at 40a). Where an action is certified pursuant to Rule 23(b)(2), class members do not have the right to opt out in order to pursue their claims in an individual action. *See* Fed. R. Civ. P. 23(c)(2)(A)-(B); (Pet. App. at 367a) (under Rule 23(b)(2), "[c]lass members have no right to 'opt out'")). As a result, if the named Petitioners had dismissed their claims for monetary damages, the members of the putative class would have been precluded from recovering compensatory and punitive damages in the event the District Court had certified Petitioners' claims for equitable relief. *See Zachary v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 244 (W.D. Tex. 1999)

> [b]ecause there appears to be no clear cut right to opt out of a Rule 23(b)(2) class action, the named Plaintiffs are asking the class members being represented here to risk waiving their right to monetary damages solely so the action for disparate treatment can proceed as a class action . . . Given the discretionary nature of the

> class action rule, the Court is not willing to gamble away the proposed class members' potential rights to compensatory damages in this case.

Accordingly, the lower courts held that the named Petitioners would not have been adequate representatives the members of the class: "to many of the class members (and especially to those who no longer work for the defendants), the monetary damages requested might be of far greater significance than injunctive relief, stated at a high order of abstraction, that simply directs the defendants not to discriminate." (*See* Pet. App. at 40a).

Petitioners counter that this conclusion was in error because "[a]ctions seeking injunctive relief for class-wide discrimination fit squarely within Rule 23(b)(2), which is 'intended primarily to facilitate civil rights class actions.'" (*See* Pet. App. at 23) (quoting *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 993 (5th Cir. 1981)). *Penson*, however, was decided *before* the Civil Rights Act of 1991, which "changed the landscape of employment discrimination law by making available compensatory and punitive damages (as well as the right to trial by jury) in Title VII cases." (Pet. App. at 41a n. 14). Indeed, Petitioners fail to cite a single case that was decided after the Civil Rights Act of 1991 to support their position that they could have adequately represented the interests of the putative class. (*See* Pet. App. at 22-24). Thus, Petitioners have not demonstrated that the District Court's desire to protect the class members' right to seek compensatory and punitive damages was an abuse of discretion.

C. Petitioners Completely Ignore the Lower Courts' Significant Seventh Amendment Concerns

Both the District Court and the Eleventh Circuit expressed concerns that the Seventh Amendment posed a significant obstacle to the certification of an "equitable relief-only" class. (*See* Pet. App. at 41a-42a, 371a-372a). Petitioners have made no effort to address these concerns — let alone demonstrate that it was an abuse of discretion for these reservations to have

influenced the District Court's decision. For this reason alone, Petitioners have not shown that the District Court abused its discretion by declining to certify an equitable relief-only class.

Further, it is clear that certifying an equitable relief-only class would have almost certainly violated the Seventh Amendment. The Reexamination Clause of the Seventh Amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States other than according to the rules of the common law." U.S. Const. amend VII. Since Petitioners demanded a jury trial in this case, the parties were entitled under the Seventh Amendment to have all matters at law determined by a single jury *before* having decisions concerning equitable relief made by the trial court. *See Ross v. Bernhard*, 396 U.S. 531, 538-39 (1970). Therefore, it would not have been possible to certify an equitable-relief only class (thereby deferring damages issues until resolution of liability) without running afoul of the Seventh Amendment. (*See* Pet. App. at 41a-42a).

Even if damage issues could be deferred until after the liability phase, it would still be necessary for a single jury to decide more than 2,000 individual claims for compensatory damages. (Pet. App. 41a-42a). In the District Court's judgment, "[t]he prospect of trying possibly two thousand of these claims before a single jury is simply absurd." (Pet. App. at 372a). Petitioners have made no effort to show how these logistical concerns constitute an abuse of discretion.

D. A So-Called "Catch 22" Does Not Exist in the Eleventh Circuit

In a last-ditch effort to persuade this Court that there are compelling reasons to grant the Petition, Petitioners contend that the Eleventh Circuit's analysis creates a "Catch-22" that "effectively eliminates class action discrimination cases in the Eleventh Circuit" under Rule 23(b)(2). (*See* Pet. App. at 22). Petitioners' argument, however, ignores the fact that Rule 23(b)(2) is not the only avenue for plaintiffs to pursue allegations

of class-wide discrimination. In this case, Petitioners also sought unsuccessfully certification under Rule 23(b)(3) — yet they do not contend that the District Court's denial of certification under Rule 23(b)(3) was an abuse of discretion. (*See* Pet. App. at 22-24, 372a). As a result, it is clear that a "Catch-22" does not exist within the Eleventh Circuit, and Petitioners therefore have not shown any compelling reasons for this Court to review this issue.

IV. *Desert Palace Has No Impact on this Case*

A. Petitioners Have Waived Their Argument that this is a Mixed-Motive Case

For the first time in the five-year history of this case, Petitioners claim that this is a "mixed-motive" case. (*See* Pet. App. at 24-25). Petitioners did not raise this contention before the District Court or the Eleventh Circuit. Therefore, Petitioners have waived this argument. *See United States v. Bean*, 537 U.S. 71, 75 n. 2 (2002) (holding argument was "waived" because it was "raised for the first time in his brief on the merits to this Court").[16]

---

16. Even if Petitioners had not waived their argument that this is a mixed-motive case, Petitioners' only evidence in support of their misguided contention is that Respondents asserted a routine mixed-motive affirmative defense in their Answer. (*See* Pet. App. at 26). This affirmative defense does not become relevant, however, until the *plaintiff* presents evidence that a protected characteristic was a "motivating factor" in the unlawful employment practice. *See* 42 U.S.C. § 2000e-5(g)(2)(B); *Salis v. University of Minnesota*, 408 F.3d 470, 475 (8th Cir. 2005) ("[m]ixed-motive cases are those in which a *plaintiff's evidence* shows that an employer's decision was motivated, at least in part, by discrimination") (emphasis added); *Bolander v. BP Oil Co.*, 128 Fed. Appx. 412, 418 (6th Cir. 2005) (finding case was "not a mixed motive case" because "there is no evidence to create an issue of fact whether age was a motivating factor in [defendant's] decision to terminate [plaintiff]"). In this case, Petitioners never presented evidence that race played a role in any of the employment decisions at issue. Therefore, it is clear that this is not a mixed-motive case.

B. *Desert Palace* Did Not Impact the *McDonnell Douglas* Framework

In the event this is not a mixed-motive case, Petitioners urge this Court to extend its decision in *Desert Palace v. Costa*, 539 U.S. 90 (2003) to single-motive cases at the summary judgment stage. (*See* Pet. App. 25). In *Desert Palace*, this Court addressed the narrow issue of "whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive [jury] instruction under 42 U.S.C. § 2000e-2(m)." 539 U.S. at 98. This Court held that direct evidence was not necessary to receive such a jury instruction. *Desert Palace*, 539 U.S. at 95-96.

From this narrow holding that relates solely to *jury instructions*, Petitioners extrapolate that the District Court somehow erred by not "imposing the burden on Respondents to demonstrate that they would have taken the same action without regard to the impermissible factor" at the *summary judgment* stage. (*See* Pet. App. at 27). Thus, Petitioners essentially contend that *Desert Palace* overruled this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) by transforming the defendant's burden at the summary judgment stage from a burden of production into a burden of persuasion. (*See id.*).

As the Eleventh Circuit held, Petitioners "read *Desert Palace* too broadly." (Pet. App. at 48a n. 17). Indeed, the plain language of *Desert Palace* demonstrates that this Court did not overrule or abrogate *McDonnell Douglas*. For instance, this Court expressly limited its holding to the mixed motive context: "[t]his case does not require us to decide when, if ever, § 107 applies outside of the mixed-motive context." *Desert Palace*, 539 U.S. at 91 n. 1. Further, this Court did not even *mention McDonnell Douglas* in *Desert Palace*. It is inconceivable that this Court would have overruled or even abrogated the "seminal" *McDonnell-Douglas* case without any discussion whatsoever. (Pet. App. at 48a n. 17). In addition, this Court relied on *Reeves*

v. Sanderson, which had employed the *McDonnell Douglas* framework. *See Desert Palace*, 539 U.S. at 100.

This conclusion is confirmed by the fact that this Court has repeatedly cited *McDonnell Douglas* with approval *after Desert Palace* was decided. *See, e.g., Johnson v. California*, 125 S. Ct. 2410, 2418 n. 7 (2005). In fact, this Court has conclusively reaffirmed that the defendant has a burden of production — not persuasion — at the summary judgment stage under the "familiar" *McDonnell Douglas* analysis:

> [u]nder *McDonnell Douglas*, a plaintiff must first establish a prima facie case of discrimination. The burden then shifts to the employer to *articulate* a legitimate, nondiscriminatory reason for its employment action. If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating the employer's explanation is pretextual.

See Raytheon Co. v. Hernandez, 540 U.S. 44, 50 n. 3 (2003) (citing *McDonnell Douglas*, 411 U.S. at 802) (emphasis added). This analytical framework is identical to the burden-shifting framework the courts below used in this case. (*See, e.g.*, Pet. App. at 47a-49a; 237a-239a). Accordingly, the District Court applied the correct legal standard in analyzing Petitioners' individual claims.

C. Adopting Petitioners' Proposed Analytical Framework Would Not Change the Outcome of this Case

According to Petitioners, the following analytical framework is applicable at the summary judgment stage in the wake of *Desert Palace*:

> *Desert Palace* applies whenever there is evidence of alternative motives so that the finder of fact could believe either or both parties as to the defendant's

> motive. *If the plaintiff proffers evidence that race played a role*, and the defendant puts in evidence that the plaintiff had a bad attitude, the jury could believe either, or could believe that both factors played a role.

(*See* Pet. App. at 27) (emphasis added). Adopting Petitioners' proposed framework, however, would not change the outcome of this case because Petitioners never proffered a shred of evidence that race was a motivating factor in any of the employment decisions at issue. Indeed, Petitioners have made no effort to point to any such evidence in the record. Thus, Petitioners' argument should be rejected for this additional reason.

D. No Circuit Court Has Found that *Desert Palace* Altered *McDonnell Douglas*

Finally, Petitioners' contention that the lower courts are in "disarray" over the impact of *Desert Palace* on *McDonnell Douglas* is simply not true. No Circuit has held that *Desert Palace* altered *McDonnell Douglas* in any way. To the contrary, the Circuits have repeatedly reaffirmed that *Desert Palace* has no impact on the *McDonnell Douglas* framework.[17] *See, e.g.*, *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1017 (8th Cir. 2005) ("*Desert Palace* really has no direct impact in the

---

17. In fact, *every* Circuit has applied the traditional *McDonnell Douglas* analytical framework since *Desert Palace* was decided. *See, e.g.*, *Hillstrom v. Best Western TLC Hotel*, No. 03-1972, 2003 WL 23095252, **3-4 (1st Cir. Dec. 31, 2003); *Terry v. Ashcroft*, 336 F.3d 128, 138 (2nd Cir. 2003); *Taylor v. Cherry Hill Bd. Of Educ.*, No. 02-3738, 2004 WL 52083, *4 (3rd Cir. Jan. 13, 2004); *Bryant v. Aiken Regional Med. Centers, Inc.*, 333 F.3d 536, 544-45 (4th Cir. 2003); *Read v. BT Alex Brown, Inc.*, 72 Fed. Appx. 112, 115 (5th Cir. 2003); *Carter v. Univ. of Toledo*, 349 F.3d 269, 273 (6th Cir. 2003); *Cerutti v. BASF Corp.*, 349 F.3d 1055, 1061 (7th Cir. 2003); *Trammel v. Simmons First Bank*, 345 F.3d 611, 614 (8th Cir. 2003); *Peterson v. Hewlett-Packard Co.*, No. 01-35795, 2004 WL 26580, *3 (9th Cir. Jan. 6, 2004); *Jones v. Barnhart*, 349 F.3d 1260, 1266 (10th Cir. 2003); *Porter v. Natsios*, 414 F.3d 13, 18 (D.C. Cir. 2005).

summary judgment context"); *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 340 (5th Cir. 2005) ("*Desert Palace* has no effect on pretext cases under *McDonnell Douglas*"). Moreover, while a minority of district courts has held that *Desert Palace* altered the traditional *McDonnell Douglas* test, the vast majority of District Courts continue to apply the *McDonnell Douglas* analysis. For these reasons, Petitioners have not carried their burden of demonstrating that the Eleventh Circuit's Opinion conflicts with a decision of this Court or a Court of Appeals or that it implicates an important question of federal law that has not been settled.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

W. CHRISTOPHER ARBERY
HUNTON & WILLIAMS
600 Peachtree Street, N.E.
Bank of America Plaza
Suite 4100
Atlanta, GA 30308-2216
(404) 888-4000

STEPHEN W. RIDDELL
Counsel of Record
T. WOOD LOVELL, JR.
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E.
Bank of America Plaza
Suite 5200
Atlanta, GA 30308-2216
(404) 885-3000

Counsel for Respondents

(2)

No. 05-88

FILED
SEP 16 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CORNELIUS COOPER, et al.,

Petitioners,

v.

SOUTHERN COMPANY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeal For The Eleventh Circuit

BRIEF OF THE IMPACT FUND, ASIAN LAW CAUCUS, INC., ASIAN PACIFIC AMERICAN LEGAL CENTER, EMPLOYMENT LAW CENTER, EQUAL RIGHTS ADVOCATES, AND PUBLIC ADVOCATES, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JOCELYN LARKIN
(*Counsel of Record*)
BRAD SELIGMAN
THE IMPACT FUND
125 University Avenue
Berkeley, CA 94710
510-845-3473

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

		Page
I.	INTERESTS OF THE *AMICI CURIAE*	1
II.	REASONS FOR GRANTING THE WRIT	4
	A. *Certiorari* is Necessary to Protect the Use of Class Actions to Enforce Civil Rights	4
	B. *Certiorari* Should Be Granted to Clarify the Standard for Satisfaction of Rule 23 in Title VII Class Actions	9
	C. *Certiorari* Should Be Granted Because the Eleventh Circuit Has Precluded the Use of Rule 23(c)(4) for Partial Certification of a Civil Rights Class Action	13
CONCLUSION		17

TABLE OF AUTHORITIES

Page

Cases:

Abdallah v. Coca-Cola, 133 F.Supp.2d 1364 (N.D.Ga. 2001) 9

Adames v. Mitsubishi Bank, Ltd., 133 F.R.D. 82 (E.D.N.Y. 1989) 6

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 7

Allen v. International Truck and Engine, 358 F.3d 469 (7th Cir. 2004) 9, 14, 15

Allison v. Citgo Petroleum, 151 F.3d 402 (5th Cir. 1998) 15

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 4, 5, 8

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) 11

Arkansas Educ. Assn. v. Board of Educ. of Portland, 446 F.2d 763 (8th Cir. 1971) 6

Babrocky v. Jewel Food Co., 773 F.2d 857 (7th Cir. 1985) 7

Bazemore v. Friday, 478 U.S. 385 (1986) 12

Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140 (2nd Cir. 1991) 8

Carnegie v. Household International, Inc., 376 F.3d 656 (7th Cir. 2004) 5

Celestine v. Petroleos de Venezuella SA, 266 F.3d 343 (5th Cir. 2001) 7

Davis v. City and County of San Francisco, 890 F.2d 1438 (9th Cir. 1989) 8

TABLE OF AUTHORITIES – Continued

Page

Dukes v. Wal-Mart Stores, 222 F.R.D. 137 (N.D. Cal. 2004) 9

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 9, 10, 11, 12, 13

Eubanks v. Billington, 110 F.3d 87 (D.C. Cir. 1997) 16

Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) 7

General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 (1982) 10

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 8, 12

Jefferson v. Ingersoll Int'l, 195 F.3d 894 (7th Cir. 1999) 16

Local 28 of the Sheet Metal Workers' International Association v. E.E.O.C., 478 U.S. 421 (1986) 9

Lowery v. Circuit City Stores, Inc., 158 F.3d 742 (4th Cir. 1998) 7

Meinhold v. Department of Defense, 34 F.3d 1469 (9th Cir. 1994) 7

Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003) 16

Monumental Life Insurance Co., 365 F.3d 408 (5th Cir. 2004) 9

Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620 (5th Cir. 1999) 6

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 5

Palmer v. Combined Insurance Co. of America, 217 F.R.D. 430 (N.D. Ill. 2003) 17

TABLE OF AUTHORITIES – Continued

Page

Reed v. Arlington Hotel Co. Inc., 476 F.2d 721 (8th Cir. 1973) 8

Robinson v. Metro North Commuter Railroad, 267 F.3d 147 (2nd Cir. 2001), *cert. denied*, 535 U.S. 951 (2002) 9, 16

Ste. Marie v. Eastern R.R. Ass'n, 72 F.R.D. 443 (S.D.N.Y. 1976) 6

Szabo v. Bridgeport Machines, Inc., 249 F.3d 672 (7th Cir. 2001) 11

Wallace v. Texas Tech. Univ., 80 F.3d 1042 (5th Cir. 1996) 7

Wetzel v. Liberty Mutual Insurance Company, 508 F.2d 239 (3rd Cir. 1975) 8

Williams v. Owens-Illinois, 665 F.2d 918 (9th Cir. 1981) 7

Zepeda v. I.N.S., 753 F.2d 719 (9th Cir. 1984) 7

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. VII 14

STATUTE:

42 U.S.C. §1981a(c) 10

RULES:

Fed. R. Civ. P. 23 ..... *passim*

Fed. R. Civ. P. 23(a)(4) 15

Fed. R. Civ. P. 23(b)(2) 8, 15, 16

TABLE OF AUTHORITIES – Continued

Page

Fed. R. Civ. P. 23(c)(1) 10

Fed. R. Civ. P. 23(c)(4) 4, 13

OTHER AUTHORITIES:

Advisory Committee Notes to 1966 Amendments to Rule 23(c)(3) (West 2003) 8, 11

Civil Rights Act of 1964 4

H. Newberg and A. Conte, *Newberg on Class Actions*, §24:1, at 5 (4th Ed. 2002) 5

I. INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are all non-profit organizations involved in protecting the rights of individuals who have experienced discrimination in the workplace. *Amici curiae* represent low and moderate-income individuals who lack the financial and legal resources necessary to enforce their rights through individual lawsuits, making class actions a critical tool for such enforcement. Collectively, *amici* have decades of experience litigating individual and class action employment discrimination and other civil rights claims in federal and state courts, and are therefore highly knowledgeable about the legal issues relevant to this case. *Amici* have frequently contributed to the development of key Title VII and Federal Rule of Civil Procedure 23 precedents in the field of class action employment discrimination – through impact litigation as well by participating as *amicus curiae* in cases before this and other courts addressing precedent-setting issues.

The Impact Fund is a legal non-profit foundation in Berkeley, California. The Impact Fund provides funding, training, advice and counseling, and *amicus* representation to non-profit organizations regarding civil rights, class action and related issues. The Impact Fund has served as class counsel in numerous civil rights class actions and is currently lead counsel in *Dukes v. Wal-Mart Stores,* (N.D. Cal., No. C 01-2252 MJJ), a nationwide sex discrimination

[1] The parties have consented to this brief and a letter of consent has been lodged with the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that no party to this case had any role in writing this brief and that no one other than *amici* made a monetary contribution to its preparation or submission.

class action challenging pay and promotion practices at the nation's largest private employer.

The **Asian Law Caucus, Inc.** ("ALC"), established in 1972, is the country's oldest civil rights and public interest legal organization serving the Asian Pacific American community. The ALC represents primarily low-income, monolingual or limited English proficient Asian Pacific Americans in the areas of employment/labor, immigration, housing/community development, and civil rights. ALC has represented Asian Pacific American workers in numerous employment discrimination cases, including *EEOC and Castrejon v. Tortilleria "La Mejor,"* 758 F. Supp. 585 (E.D. Cal. 1991) (Title VII case holding that undocumented workers are protected against sex discrimination in employment, notwithstanding the passage of the Immigration Reform and Control Act of 1986) and *Ramirez v. General Services Administration, et al.*, Case No. C 93-0539 VRW (N.D. Cal. 1993) (accent discrimination case involving five Filipino security guards who were removed from their posts at the Department of Treasury building by American Mutual per a request from GSA).

The **Asian Pacific American Legal Center** of Southern California (APALC) was founded in 1983 and is the largest non-profit public interest law firm devoted to the Asian Pacific American community. APALC provides direct legal services and uses impact litigation, public advocacy and community education to obtain, safeguard and improve the civil rights of the Asian Pacific American community. Its primary areas of work include workers' rights, anti-discrimination, immigrant welfare, immigration and citizenship, voting rights and hate crimes.

The **Employment Law Center** (ELC), a project of the Legal Aid Society of San Francisco, has long litigated on behalf of persons of color, recent immigrants, women, individuals with disabilities, sexual minorities, and other traditionally subordinated, low-income communities on issues of workplace rights.

Equal Rights Advocates (ERA) is a San Francisco-based human and civil rights organization dedicated to securing legal and economic equality for women through litigation, advocacy and public education. For 25 years, ERA has represented the rights of women in the courts, legislatures, and public education campaigns. It has undertaken difficult impact litigation that no private firm would handle that has resulted in establishing new law and provided significant benefits to large groups of women.

Public Advocates, Inc. is one of the oldest non-profit public interest law firms in the nation. Throughout its history, the firm's mission has been to challenge the persistent, underlying causes and effects of poverty and discrimination and to work for the empowerment of the poor and people of color. Public Advocates uses diverse litigation and non-litigative strategies. Its current efforts focus on education, health care, telecommunications, employment, community economic development and insurance redlining.

II. REASONS FOR GRANTING THE WRIT

This Court has long recognized that the class action procedure furthers judicial efficiency and ensures the "vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Products v. Windsor*, 521 U.S. 591, 617 (1997), *citing* Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L. Rev. 497, 497 (1969). For the enforcement of this nation's civil rights laws, the class action mechanism serves additional – and even more critical – public policy goals.

The Eleventh Circuit's decision in this case creates an insurmountable barrier to class certification in Title VII cases. It puts plaintiffs to the all but impossible burden of proving their case on the merits at the class certification stage. The decision jeopardizes the ability of plaintiffs to obtain Rule 23(c)(4) certification of injunctive relief only – essential to eliminating systemic discrimination in their workplace. *Certiorari* should be granted because the decision in this case undermines the future viability of Title VII class actions and the critical role they serve in the enforcement of civil rights protections.

A. *Certiorari* is Necessary to Protect the Use of Class Actions to Enforce Civil Rights

With the passage of the Civil Rights Act of 1964, Congress expressly provided for private enforcement of the nation's civil rights laws to supplement public agency enforcement. "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad

compliance with the law." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401 (1968). Private class actions have proven to be a highly effective tool in battling race and gender discrimination in the workplace. *See* H. Newberg and A. Conte, *Newberg on Class Actions*, §24:1, at 5 (4th Ed. 2002) ("employment class actions are an excellent means to eradicate widespread or institutional-scale discrimination").

Most fundamentally, class actions provide a mechanism for individual victims of discrimination to obtain relief, even though the value of their back pay claims may be small. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Products*, 521 U.S. at 617, *citing Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997). For the millions of low-wage workers in the United States, a claim for unequal pay or a lost promotional opportunity may translate into no more than $10 or $20 per paycheck – an amount that could never justify a federal lawsuit. Without the benefit of class actions, the alternative will likely be no lawsuit at all. *See Carnegie v. Household International, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("the *realistic* alternative to a class action is not 17 million individual suits, but zero individual lawsuits, as only a lunatic or a fanatic sues for $30 dollars") (emphasis in original).

In this regard, civil rights class actions provide the same policy benefit as class actions for other small value claims, such as consumer claims. But, civil rights class actions serve other and unique purposes in enforcing anti-discrimination laws.

Civil rights class actions provide a means of achieving justice for victims who would not sue on their own because of their justifiable *fear of retaliation*. Civil rights is a hollow promise when the cost of vindicating those rights is the weekly paycheck upon which a struggling family must survive. When workers join together to challenge their employer's practices in court, each class member is far less vulnerable to retaliation in the form of harassment or job loss. This 'strength in numbers' is particularly important because discriminatory practices often target the most economically vulnerable groups, many of whom may also be unfamiliar with the legal system.

Courts have long recognized that this fear of retaliation is one factor that demonstrates individual lawsuits are not a practical alternative to the class action. This is particularly true when class members are current employees. Indeed, "the risks entailed in suing one's employer are such that the few hardy souls who come forward should be permitted to speak for others when the vocal ones are otherwise fully qualified." *Ste. Marie v. Eastern R.R. Ass'n*, 72 F.R.D. 443, 449 (S.D.N.Y. 1976). *See also Mullen v. Treasure Chest Casino, LLC,* 186 F.3d 620, 624 (5th Cir. 1999) (class certified where "putative class members still employed by the Casino might be reluctant to file individually for fear of workplace retaliation"); *Arkansas Educ. Assn. v. Board of Educ. of Portland*, 446 F.2d 763, 765 (8th Cir. 1971) (class of 20 public school teachers certified who might have "natural fear or reluctance to bring this action on an individual basis"); *Adames v. Mitsubishi Bank, Ltd.*, 133 F.R.D. 82, 89 (E.D.N.Y. 1989) ("[s]ince here a number of putative members are current employees, the concern for possible employer reprisal action exists and renders the alternative of individual joinder less than practicable.").

Civil rights class actions also permit district courts to order *broad injunctive relief* to require an employer to change its practices, if a violation is proven. District courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Indeed, "the primary objective of Title VII is prophylactic." *Williams v. Owens-Illinois*, 665 F.2d 918, 931 (9th Cir. 1981). "Towards this end, Congress has granted broad equitable powers to enable the courts to fashion the most complete relief possible." *Id.*, *citing Albemarle*, 422 U.S. at 418. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 770-71 (1976) ("discretion is vested not for purposes of 'limit[ing] appellate review of trial courts, or . . . invit[ing] inconsistency and caprice,' but rather to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case." (citation omitted).

In contrast, this same kind of broad injunctive relief – the hallmark of a Title VII class action – is ordinarily *not* available in an individual employment discrimination action. *See, e.g., Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1047 n.3 (5th Cir. 1996); *Meinhold v. Department of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994). Indeed, in some circuits, individual plaintiffs are not permitted to bring pattern and practice claims at all, absent a certified class. *See, e.g., Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998); *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 355 (5th Cir. 2001); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 866-67 (7th Cir. 1985). In the Ninth Circuit, a court may not order injunctive relief that benefits anyone other than the plaintiffs in an individual case. *Zepeda v. I.N.S.*, 753 F.2d

719, n.1 (9th Cir. 1984) ("if this elementary principle were not true, there would be no need for class actions").[2]

In civil rights class actions, district courts have exercised their equitable powers to fashion a wide variety of injunctive orders specifically targeted at the employment practices found to be discriminatory. For example, courts have ordered defendants to change specific employment practices to remedy discrimination. *See, e.g., Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1140 (2nd Cir. 1991) (company ordered to change the way an employment test was used so that banding of test scores was required); *Reed v. Arlington Hotel Co. Inc.*, 476 F.2d 721 (8th Cir. 1973) (company required to abolish distinction between two departments and merge jobs to remedy discrimination in hiring and promotions). Other courts have required affirmative action to remedy past discrimination. *See, e.g., Davis v. City and County of San Francisco*, 890 F.2d 1438, 1449-52 (9th Cir. 1989) (requiring affirmative action in the hiring of women and people of color for firefighter positions). Defendants may be required to maintain records of its employment decisions and report to the court on their progress. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361 (1977). A district court also may appoint a special master

---

[2] When Rule 23 was overhauled in 1966, the Federal Rules Advisory Committee specifically included subsection (b)(2) to authorize such injunctive actions to facilitate the vindication of civil rights through the class action device. *Wetzel v. Liberty Mutual Insurance Company*, 508 F.2d 239, 250 (3rd Cir. 1975); Advisory Committee Notes to 1966 Amendments to Rule 23 (West 2003). *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997) ("civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of (b)(2) cases).

to monitor compliance with its orders in the workplace. *See, e.g., Local 28 of the Sheet Metal Workers' International Association v. E.E.O.C.*, 478 U.S. 421 (1986).

Although enforcement efforts have largely eliminated the most overt forms of employment discrimination, civil rights class actions remain a necessary tool to combat systemic discrimination. *See, e.g., Allen v. International Truck and Engine,* 358 F.3d 469 (7th Cir. 2004) (black employees successfully sought class certification for a hostile workplace claim); *In re Monumental Life Insurance Co.,* 365 F.3d 408 (5th Cir. 2004) (class of black policyholders challenged insurance company's practice of paying lower benefits and charging higher premiums); *Robinson v. Metro North Commuter Railroad,* 267 F.3d 147 (2nd Cir. 2001), *cert. denied,* 535 U.S. 951 (2002) (court certified class of black employees challenging company's alleged practice of race discrimination in pay and promotion); *Dukes v. Wal-Mart Stores,* 222 F.R.D. 137 (N.D. Cal. 2004) (court certified class of more than 1.6 million women challenging gender discrimination in pay and promotion); *Abdallah v. Coca-Cola,* 133 F.Supp.2d 1364 (N.D.Ga. 2001) (settlement valued at $192.5 million in race discrimination class action). *Certiorari* should be granted because the decision in this case threatens the effectiveness of this tool for the enforcement of essential civil rights protections.

B. *Certiorari* Should Be Granted to Clarify the Standard for Satisfaction of Rule 23 in Title VII Class Actions

In *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974), this Court expressly prohibited a district court from evaluating the underlying merits of an action when considering whether the case should be certified as a class

action. Nothing in Rule 23 "gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 177. While a district court may "look beyond the pleadings" at the substantive claims of the parties to determine whether the elements of Rule 23 have been met, it may not assess the merits of plaintiffs' claims. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen*, 417 U.S. at 178.

This Court's admonition in *Eisen* derives directly from the language and purpose of Fed. R. Civ. P. 23. In determining a motion for class certification, courts must "at an early practicable time – determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1). The drafters of the Rule recognized that the parties will not ordinarily have conducted full discovery at the time of a class certification motion. A decision on the merits in the context of that motion would necessarily be premature and potentially incorrect. Indeed, to allow for the kind of discovery that would make a decision on the merits at the class certification stage fair and accurate would compromise Rule 23's goal of judicial efficiency. Moreover, any factual findings at the class certification stage in a disparate treatment case could run afoul of the parties' respective rights to a jury trial. 42 U.S.C. §1981a(c).

The *Eisen* rule also reflects a critical policy choice made by the drafters of the 1966 Amendments to Rule 23 – that is, that a class ruling must operate entirely independent of the merits. By separating the procedural analysis

for purposes of class certification from the substantive decision on the merits, the Committee addressed and eliminated the abuses inherent in one-way intervention. The Advisory Committee Notes to the 1966 Amendments explain:

> Hitherto . . . courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. . . . Under [the revised rule], one-way intervention is excluded; the action will early have been determined to be a class or nonclass action and in the former case, the judgment, whether or not favorable, will include the class. . . .

Advisory Committee Notes to 1966 Amendments to Rule 23(c)(3) (West 2003) (citations omitted). As the Seventh Circuit has observed, "[t]he success of the 1966 amendments to Rule 23 (which are still in force) depends on making a definitive class certification decision before deciding the case on the merits, and on judicial willingness to certify classes that have weak claims as well as strong ones." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) (emphasis added). *Accord American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 547 (1974) (one-way intervention "a recurrent source of abuse" under prior rule).

Contrary to this Court's *Eisen* rule, the Eleventh Circuit's decision endorsed an analysis by the district court, which required the plaintiffs to prove liability in order to satisfy Rule 23. The district court *explicitly* relied on the *liability* standard for pattern and practice cases

established by this Court's ruling in *Teamsters* in order to assess the Rule 23 requirements. "To obtain certification of a class . . . the plaintiffs must show not merely that they individually were subjected to discriminatory ('disparate') treatment; they must show that 'racial discrimination was the [company's] standard operating procedure – the regular rather than the unusual practice.'" *Cooper*, Pet. App. 322a (*quoting Teamsters*, 431 U.S. at 336). Rather than applying the requirements of Rule 23, the district court tested whether the plaintiffs met the legal standard to win on the merits. Compounding this error, the district court delved deeply into an analysis of the evidence. Pet. App. 329a-337a.[3] The court concluded that class certification should be denied because "the pattern and practice standard described in *Teamsters* [was] not met," Pet. App. 374a, again conflating the Rule 23 inquiry with the liability standard for Title VII disparate treatment pattern and practice cases.

In reviewing the district court, the Eleventh Circuit recognized that this Court's *Eisen* jurisprudence prohibited an evaluation of the merits, although the Rule 23 inquiry might nonetheless touch on the merits. "[B]oth the Supreme Court and this Court have noted since *Eisen* that evidence pertaining to the requirements embodied in Rule 23 is often intertwined with the merits, making it impossible to meaningfully address the Rule 23 criteria without at least touching on the 'merits' of the litigation." Pet. App. 40a.

---

[3] As part if its determination, the district court and the Eleventh Circuit purported to evaluate the parties' expert statistical evidence against the standards set forth by this Court in *Bazemore v. Friday*, 478 U.S. 385 (1986). *Bazemore* is the standard for statistical proof *at trial*, not at class certification. *Id.* at 400-01.

The Eleventh Circuit failed to recognize, however, that the lower court's analysis went well beyond "touching on the merits." Rather than a Rule 23 determination, the district court engaged in an actual adjudication of the merits in clear violation of *Eisen*. Nevertheless, the Eleventh Circuit affirmed the district court, concluding that "it was plainly necessary for the district court to evaluate the statistical evidence the plaintiffs submitted in order to determine whether it *established* the discrimination of which plaintiffs complained." Pet. App. 30a (emphasis added). As for the plaintiffs' anecdotal evidence, the Eleventh Circuit held that "the district court acted within its discretion in determining that . . . the anecdotal evidence . . . was inadequate to *establish* discrimination classwide." Pet. App. 36a-37a (emphasis added).

Requiring class certification motions to actually establish discrimination sufficient to prevail on the merits turns a procedural inquiry into a trial on the merits, with none of the usual protections for either party attendant to a real trial. Courts following this approach thus violate not only the clear holding of *Eisen*, but the critical policy rationale that the ruling stands for – class certification should bind class members to a future determination of the merits, whatever that outcome may be. The Eleventh Circuit has essentially approved one-way intervention in clear defiance of this court's prior mandates.

C. *Certiorari* Should Be Granted Because the Eleventh Circuit Has Precluded the Use of Rule 23(c)(4) for Partial Certification of a Civil Rights Class Action

Fed. R. Civ. P. 23(c)(4) permits a district court to certify a class as to some but not all issues ("an action may

be brought or maintained as a class action with respect to particular issues . . . and the provisions of this rule shall then be construed and applied accordingly."). The Seventh Circuit recently explained the benefits of certifying solely an equitable relief claim in a Title VII class action in *Allen*, 358 F.3d at 471. In *Allen*, the district court refused to certify an 'equitable relief only' class concluding that it would "result in confusion and be overly burdensome to the resources of the court system."[4] Judge Easterbrook, writing for the panel, disagreed.

> It is hard to see why management of a class certified under Rule 23(b)(2) for prospective relief alone would be any more difficult than management of a suit with 27 individual plaintiffs seeking both legal and equitable relief. In either event, a jury trial must be held, and factual matters bearing on both damages and injunctive relief must be presented to that body. . . . What is more, handling equitable issues on a class-wide basis would solve a problem sure to bedevil individual proceedings: How is it feasible to draft and enforce an injunction that will bear on these 27 plaintiffs alone, and *not* on the other 323 black employees? Unless it is possible to prepare such relief – and we do not see how it could be, or why a court should try – then the equitable aspects of the litigation are class-wide whether the judge certifies a class action or not. (The need for, if not inevitability of, class-wide treatment when

[4] The Seventh Circuit also rejected the district court's determination that partial certification would run afoul of the Seventh Amendment. *Allen*, 358 F.3d at 472.

> injunctive relief is at stake is what Rule 23(b)(2) is about.)

358 F.3d at 469 (emphasis in original). The Seventh Circuit remanded the case with instructions to certify a class under Rule 23(b)(2) for equitable matters and to reconsider class treatment of damages.

Here, the Eleventh Circuit affirmed the denial of plaintiffs' request to certify a class solely for equitable relief. Pet. App. 41a. Its reasoning is deeply troubling because it places victims of discrimination in a quandary that Congress never could have intended. The panel concluded that, were the named plaintiffs to pursue only equitable relief on a class-wide basis, they would likely not be adequate class representatives under Rule 23(a)(4). "[T]o the extent the named plaintiffs were willing to forego class certification on damages in order to pursue injunctive relief . . . it is far from clear that the named plaintiffs would adequately represent the interests of the other putative class members." Pet. App. 40a. On the other hand, had the named plaintiffs in fact pled claims of compensatory damages on a class-wide basis, class certification under Rule 23(b)(2) would have been automatically denied under the law in that circuit.[6] This draconian 'damned if you do, damned if you don't' rule gives victims of discrimination little choice but to forfeit the class treatment that may be their only realistic hope for enforcing their civil rights and particularly the injunction that will eradicate the causes of systemic discrimination in their workplace.

---

[6] The Eleventh Circuit follows the Fifth Circuit's decision in *Allison v. Citgo Petroleum*, 151 F.3d 402, 415 (5th Cir. 1998), which prohibits compensatory damages in a Rule 23(b)(2) class.

There is, moreover, a simple solution to the problem. Where the named plaintiffs choose not to pursue compensatory damages on behalf of the class, numerous circuits authorize the provision of notice and an opt-out rights in (b)(2) cases so that class members may pursue compensatory damages individually, if they wish to. "Absent class members may . . . need notice that their claims are being pursued in the class action and the opportunity either to opt out and pursue their claims separately or to intervene, should they conclude such active participation would better protect their individual interests." *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 166 (2nd Cir. 2001). *See Jefferson v. Ingersoll Int'l*, 195 F.3d 894, 898 (7th Cir. 1999); *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997); *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003).

The Eleventh Circuit's decision also usurps the critical role of class counsel in making strategic decisions, such as this, for the class. Among the most important of these strategic choices are which claims to plead and which relief to seek. There may well be appropriate circumstances where the class is willing to forego compensatory damages in order to secure necessary injunctive relief.

> If a class is willing to sacrifice compensatory relief in their class action to meet Rule 23 requirements, thus evincing a paramount desire to stop systemic discrimination and prevent future harm, they should be allowed to proceed. The difficulties often encountered in certifying a Title VII class for compensatory damages should not preclude a class of plaintiffs from seeking alternative ways to serve the public interest by ending widespread discrimination.

Palmer v. Combined Insurance Co. of America, 217 F.R.D. 430, 441 (N.D. Ill. 2003).

The Eleventh Circuit's decision deprives Title VII victims of the ability to bring the class action best suited to redressing the systemic discrimination that they face.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOCELYN LARKIN
(*Counsel of Record*)
BRAD SELIGMAN
THE IMPACT FUND
125 University Avenue
Berkeley, CA 94710
510-845-3473

Attorneys for Amici Curiae

(5)

No. 05-88

Supreme Court, U.S.
FILED
SEP 26 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CORNELIUS COOPER, *et al.*,

Petitioners,

v.

SOUTHERN COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

MICHAEL B. TERRY
Counsel of Record
JOSHUA F. THORPE
STEVEN J. ROSENWASSER
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree St., NW
Atlanta, Georgia 30309
(404) 881-4100

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. The Brief In Opposition Demonstrates That The Lower Courts Improperly Decided The Merits In Evaluating Class Certification 2

II. The Brief In Opposition Confirms That The Opinion Eliminates Class Employment Cases In The Eleventh Circuit 5

III. The Seventh Amendment Issue Raised In The Brief In Opposition Is A Reason To Grant Certiorari 6

IV. Certiorari Is Necessary To Resolve The Burden Of Proof At The Summary Judgment Stage After *Desert Palace* 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Allen v. International Truck & Engine Corp., 358 F.3d 469 (7th Cir. 2004) 7

Allison v. Citgo Petroleum, Inc., 151 F.3d 402 (5th Cir. 1998) 5, 6

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 8

Beck v. Boeing, 60 Fed. Appx. 38 (9th Cir. 2003) 7

Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2d Cir. 1999) 3

Chapman v. AI Transp., 229 F.3d 1012 (11th Cir. 2000) (*en banc*) 9

Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003) 7, 8, 9, 10

Dotson v. Broehel, 91 Civ. 5039, No. 85-7422, 1993 U.S. Dist. LEXIS 8309 (S.D.N.Y. June 15, 1992) 8

Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147 (1982) 4

Kembel v. Bethlehem Steel Corp., 1987 U.S. Dist. LEXIS 2212 (E.D. Pa. Feb. 10, 1987) 8

McManus v. Fleetwood Enters., Inc., 320 F.3d 545 (5th Cir. 2003) 6

Martin v. O'Conner, 225 B.R. 283 (N.D.N.Y. 1998), *aff'd*, 181 F.3d 83 (2d Cir. 1999) 8

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) 8

TABLE OF AUTHORITIES – Continued

Page

Robinson v. Metro-North Commuter R.R., 267 F.3d 147 (2d Cir. 2001) 7

Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011 (8th Cir. 2005) 8, 9

RULE

Rule 23(b) 1, 2, 3, 6

OTHER AUTHORITIES

Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include An Assessment of the Merits*, 168 F.R.D. 366 (1996) 4

Comment: Between "Merit Inquiry" and "Rigorous Analysis" Using Daubert to Navigate the Gray Areas of Federal Class Action Certification, 31 Fla. St. U.L. Rev. 1041 (2004). 4

David S. Evans, *Class Certification, The Merits, and Expert Evidence*, 11 Geo. Mason L. Rev. 1 (2002) 4

REPLY BRIEF FOR PETITIONERS

Respondents' Brief in Opposition demonstrates precisely why certiorari is warranted in this case. First, Respondents' Brief highlights the confusion regarding how courts should apply *Falcon*'s pronouncement that a Court may "look beyond the pleadings" to determine whether the requirements of Rule 23 are met without violating *Eisen*'s prohibition against conducting a preliminary inquiry into the merits at class certification. As Respondents' Brief points out, the district court cites *Eisen*'s prohibition, but then (after concluding that Dr. Madden's Reports were admissible) "spent *ten pages* conducting a painstaking, thorough analysis of Dr. Madden's Report" and conducted a detailed examination of Petitioners' anecdotal evidence. Respondents' Brief ("Resp. Brf.") at 13. The district court then denied certification on the ground that the "strength and quality of [Petitioners'] evidence" did not "convince the Court" of a pattern or practice of discrimination or "establish the discrimination of which plaintiffs complained." Pet. App. 30a, 366a. By denying certification on the ground that Petitioners' evidence did not "convince the Court" of the merits of Petitioners' claims, the court went well beyond "look[ing] beyond the pleadings" to determine whether Petitioners raised common questions and met the requirements of Rule 23. Instead, it conducted a merits-based examination of the evidence in violation of *Eisen*. Specifically, the court found that liability was not a common issue because plaintiffs failed at the class certification stage to prove to the court's satisfaction that there was a pattern or practice of discrimination at Southern Company. The Eleventh Circuit expressly affirmed on this basis. Certiorari should be granted to provide lower courts guidance as to the extent a court can examine the evidence at the class certification stage.

Respondents' Brief also confirms that the Eleventh Circuit's Opinion effectively forecloses class action employment discrimination cases in that circuit. Respondents agree that, under the Opinion, certification under Rule 23(b)(2) is precluded because if the Named Plaintiffs seek an equitable-relief only class, they are inadequate for failing to raise damages claims, but if they attempt to remedy that alleged defect by seeking damages, certification is improper because individual issues relating to damages predominate.

Recognizing that Congress never intended to remove the class-action mechanism for employment matters, Respondents pretend to avoid that result by suggesting that certification can also be sought under Rule 23(b)(3). But, if the individual issues preclude certification under Rule 23(b)(2), then they also preclude certification under 23(b)(3), which requires that common issues "predominate" over individual ones. Thus, unless certiorari is granted, victims of discrimination will be stripped of their right to pool their resources and assert class-wide claims to obtain injunctive relief to remedy the causes of systemic discrimination.

I. The Brief In Opposition Demonstrates That The Lower Courts Improperly Decided The Merits In Evaluating Class Certification

Respondents' Brief in Opposition demonstrates precisely why this Court should grant certiorari in this case: Lower courts and litigants are ignoring or do not understand *Eisen*'s proscription on a court deciding the merits of a claim when ruling on a motion for class certification. Just as the Eleventh Circuit's opinion mouths the rule that a court may not decide the merits at the class certification stage but then proceeds to affirm the denial of

certification on the basis that Petitioners did not prove the existence of a pattern and practice of discrimination, Respondents mouth the same rule and then proceed to defend the denial of certification on the basis that the district court *properly* weighed how *probative*, how *convincing* and how *strong* Petitioners' evidence of discrimination was – questions that all involve whether Petitioners proved the merits of their claims. Both the opinion below and Respondents' Brief say one thing and do another.

The issues presented in this Petition are not issues of semantics, but of substance. The Eleventh Circuit's opinion establishes a new rule: a district court may determine whether an employment discrimination plaintiff meets the requirements of Rule 23 by determining whether the plaintiff has "established," *i.e.*, proved, a pattern and practice of discrimination. Pet App. 30a ("it was plainly necessary for the district court to evaluate the statistical evidence the plaintiffs submitted ***in order to determine whether it established the discrimination of which plaintiffs complained***") (emphasis added). That rule violates *Eisen* and is different from the rule in other Circuits, such as the Second. In *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999), the Second Circuit held, "***Regardless of their ultimate persuasiveness on the issue of liability***, the statistical report and anecdotal evidence submitted by the Class Plaintiffs are ***sufficient to demonstrate common questions of fact*** regarding the discriminatory implementation and effects of [the defendant's] company-wide policies regarding promotion and discipline." That approach, which analyzes whether a plaintiffs' evidence raises common questions, not whether the plaintiffs' evidence "establishes" discrimination, is substantively and significantly different from the Eleventh Circuit's approach.

The lower courts are split on and confused about how to reconcile the *Eisen* rule with *Falcon*'s call for a "rigorous analysis" of whether the requirements of Rule 23(a) have been satisfied and *Falcon*'s statement that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982). "[C]ourts have struggled to conduct *Falcon*'s "rigorous analysis" while avoiding *Eisen's* prohibition of a preliminary inquiry into the merits." *Comment: Between "Merit Inquiry" and "Rigorous Analysis" Using Daubert to Navigate the Gray Areas of Federal Class Action Certification*, 31 Fla. St. U. L. Rev. 1041 (2004).[1] This Court should

[1] David S. Evans, *Class Certification, The Merits, and Expert Evidence*, 11 Geo. Mason L. Rev. 1, 1-2 (2002) ("One [aspect of the class certification standard] concerns whether evidence that bears on the merits of the claims should be walled off from the analysis of the class-certification questions. The other deals with whether the courts should weigh expert evidence on the class-certification requirements. These questions would seem ripe for U.S. Supreme Court review in the face of a serious split among the circuits. The Seventh Circuit's decision in *Szabo v. Bridgeport Machines, Inc.* could not be more different from the Second Circuit's decision in *Caridad v. Metro-North Commuter R.R.* In *Szabo*, the court stated that courts should consider evidence on the merits if that evidence was relevant to assessing whether the plaintiffs proposed class met the Federal Rule of Civil Procedure 23 requirements. In *Caridad*, the court stated that merits evidence was off limits and that the lower court could not consider expert evidence from the defendant. Several circuits have come close to joining one of these two camps – the First, Third, and Fifth Circuits are closer to *Szabo* than *Caridad*; the Tenth Circuit is closer to *Caridad*; the others do not have a well-settled standard and lower courts exercise considerable discretion.") (footnotes omitted); Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include An Assessment of the Merits*, 168 F.R.D. 366, 369 (1996) ("There is an obvious tension between decisions that permit assessment of the merits as part of the class action analysis, and decisions that continue to follow Eisen. The line between the two kinds of decisions is unclear, as is the logic of the courts' line-drawing process.").

resolve the split among the Circuits and the confusion regarding the meaning of *Eisen*. The question of how a court should approach the plaintiffs' evidence recurs in virtually every class case. Moreover, the Eleventh Circuit's Opinion demonstrates the danger of allowing the confusion to continue – the Eleventh Circuit has now created a rule that, despite the Civil Rights Act of 1991 and despite the language of Rule 23, allows courts, not juries, to decide the merits of claims of systemic discrimination. That rule, and the Catch-22 the Eleventh Circuit has also created, severely undermine the scheme Congress has put in place for enforcement of the nation's civil rights laws.

II. The Brief In Opposition Confirms That The Opinion Eliminates Class Action Employment Cases In The Eleventh Circuit

Respondents' brief confirms that the Opinion creates a "Catch 22" that effectively eliminates class actions as a means of protecting and enforcing civil rights in the Eleventh Circuit. If certification of an injunctive-relief only class is requested, then "the lower courts held that the named Petitioners would not have been adequate representatives" for failing to represent the interests of putative class members who might have damages claims. Resp. Brf. at 22-23. But, if the Named Plaintiffs seek to correct that alleged defect by requesting certification of damages claims, certification is improper because individual issues predominate under *Allison v. Citgo Petroleum, Inc.*, 151 F.3d 402, 415 (5th Cir. 1998).[2]

---

[2] The Eleventh Circuit expressly follows the Fifth Circuit's decision in *Allison*, which prohibits compensatory damages in employment discrimination class actions. Pet. App. 39a ("In *Murray*, we adopted the position of the Fifth Circuit in *Allison*.").

Respondents do not dispute that the Eleventh Circuit Opinion creates this quandary with respect to certification under Rule 23(b)(2). Resp. Brf. at 22-25. However, recognizing that Congress clearly did not intend to foreclose the class action mechanism as a means for enforcing civil rights and obtaining injunctive relief, Respondents contend that no "Catch 22" exists because plaintiffs can pursue class-wide treatment under Rule 23(b)(3). Resp. Brf. at 24-25. But if damages claims create individualized issues that preclude certification under Rule 23(b)(2), then those damages claims also preclude certification under the stricter standard of Rule 23(b)(3), which requires that common questions of law and fact "predominate" over individual issues. *See McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 552 (5th Cir. 2003) ("Rule 23(b)(2)'s requirement that a defendant have acted consistently towards the class is plainly more permissive than 23(b)(3)'s requirement that questions common to the class *predominate* over individual issues."). Accordingly, certiorari should be granted to eliminate the Opinion's "Catch 22" which, if left intact, eliminates the ability of victims of discrimination to use the class action mechanism to remedy systemic discrimination.

III. The Seventh Amendment Issue Raised In The Brief In Opposition Is A Reason To Grant Certiorari

Respondents contend that in requesting an equitable-relief only class, Petitioners ignore the lower Courts' "concern that the Seventh Amendment posed a significant obstacle to the certification of an equitable-relief only class." Resp. Brf. at 23. But, there is a Circuit split as to whether the Seventh Amendment precludes certification of an equitable-relief only class. *Compare Allison*, 151 F.3d at

419 ("the potential overlap of issues that would be decided in bifurcated proceedings implicated significant Seventh Amendment . . . problems") *with Beck v. Boeing*, 60 Fed. Appx. 38, 40 (9th Cir. 2003) ("We reject [defendant's] argument that a bifurcated trial plan violates the Seventh Amendment's Reexamination Clause."); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 169-70 n.13 (2d Cir. 2001) (rejecting argument that "overlapping factual issues would be presented to the liability-phase and remedial-phase juries in violation of the Re-examination Clause"); *Allen v. International Truck & Engine Corp.*, 358 F.3d 469, 471 (7th Cir. 2004) ("[c]ertifying a class for injunctive purposes, while handling damages claims individually, does not transgress the seventh amendment."). Thus, certiorari should be granted to resolve that question.

IV. Certiorari Is Necessary To Resolve The Burden Of Proof At The Summary Judgment Stage After *Desert Palace*

Respondents first contend that certiorari is not warranted on the *Desert Palace* issue because Petitioners have not previously claimed that this was a mixed-motive case. But, "the terms single-motive and mixed motive . . . primarily refer to the theory or theories by which the defendant opposes the plaintiff's claim of discrimination." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 854 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003). Here, Respondents expressly asserted a mixed-motive defense in their answer to the complaint (R. 66-67) and in several subsequent pleadings. Moreover, contrary to Respondents' assertions, Petitioners raised this precise issue in the Eleventh Circuit and the Eleventh Circuit ruled upon it: "The plaintiffs argue, however, that the *McDonnell Douglas* burden-shifting analysis applied to claims of employment

discrimination was radically revised by the Supreme Court in *Desert Palace, Inc. v. Costa*. . . . The plaintiffs read *Desert Palace* too broadly." Pet. App. 48a n.17.

Respondents then contend that *Desert Palace* does not apply to this case because it impacted the burden of proof at trial, not summary judgment. *See* Resp. Br. at 26 (*Desert Palace* is a "narrow holding that relates only to *jury instructions*") (emphasis in original); *id.* at 28-29 ("*Desert Palace* really has no direct impact in the summary judgment context"). Respondents are thus arguing that at trial a plaintiff need not prove pretext to prevail, but to survive summary judgment, the plaintiff must do precisely that. That is absurd. Plaintiffs cannot be put to a higher burden at summary judgment than at trial. As a matter of law, the standard for summary judgment must mirror the standard for liability at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("we are convinced that the inquiry involved in a ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.")[3]

In arguing that *Desert Palace* does not apply at summary judgment, Respondents rely on the Eighth Circuit's quote that "*Desert Palace* really has no direct impact in the summary judgment context." *Strate v.*

---

[3] *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) ("the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.' "); *Martin v. O'Conner*, 225 B.R. 283, 287 (N.D.N.Y. 1998), *aff'd*, 181 F.3d 83 (2d Cir. 1999) ("The burden proof for summary judgment rests on the same party it would rest on at trial"); *Dotson v. Broehel*, 91 Civ. 5039, No. 85-7422, 1993 U.S. Dist. LEXIS 8309 (S.D.N.Y. June 15, 1993) (same); *Kembel v. Bethlehem Steel Corp.*, 1987 U.S. Dist. LEXIS 2212 (E.D. Pa. Feb. 10, 1987) (same).

Midwest Bankcentre, Inc., 398 F.3d 1011, 1017 (8th Cir. 2005). Respondents' citation to *Strate* is misleading because the Eighth Circuit had already adopted the crux of *Desert Palace* before that Opinion was issued, as recognized by the Eighth Circuit in the very case upon which Respondents rely:

> our cases utilizing the *McDonnell Douglas* methodology at the summary judgment stage are, in principle, consistent with *Desert Palace*. Contrary to *Strate's* apparent understanding of the law, *we have long recognized* that a genuine issue of fact regarding unlawful employment discrimination may exist notwithstanding the plaintiff's inability to directly disprove the defendant's proffered reason for the adverse employment action.

Strate, 398 F.3d at 1017-18 (emphasis added). Unlike the Eighth Circuit, however, the Eleventh Circuit has expressly rejected the proposition that a genuine issue of fact regarding unlawful employment discrimination may exist notwithstanding the plaintiff's inability to disprove the defendant's proffered reason for the adverse employment action. In fact, where the defendant proffers multiple reasons for the adverse employment action, the Eleventh Circuit requires the plaintiff to disprove *each* proferred reason to avoid summary judgment. *Chapman v. AI Transp.*, 229 F.3d 1012, 1024-25 (11th Cir. 2000) (*en banc*). *See* Pet. App. 49a (same holding). Thus, while *Desert Palace* may not have changed the summary judgment standard in the Eighth Circuit because that Circuit's standard was already "consistent with *Desert Palace*" (*Strate*, 398 F.3d at 1017), *Desert Palace* is facially *in*consistent with the summary judgment standard in the Eleventh Circuit. Thus, without regard to whether the split resulted from *Desert Palace*, the post-*Desert Palace* summary judgment standard is entirely different in the

Eighth Circuit than the Eleventh Circuit, reflecting the circuit split that should be resolved by this Court.

Finally, Respondents argue that the application of the *Desert Palace* paradigm would not change the outcome of this case because "petitioners have never proffered a shred of evidence that race was a motivating factor in any of the employment decisions at issue. Indeed, Petitioners have made no effort to point to any such evidence in the record." Resp. Br. at 28. This assertion is patently incorrect. The evidence is discussed in Pet. 1-2, 4-6, 26, 26 n.12, and throughout the appendix. In fact, the District Court held that six of seven of the individual plaintiffs established a *prima facie* case, but granted summary judgment based on the alleged failure to prove pretext – the very thing Petitioners would have no burden to do under *Desert Palace*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL B. TERRY
Counsel of Record

JOSHUA F. THORPE
STEVEN J. ROSENWASSER
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree St., NW
Atlanta, Georgia 30309
(404) 881-4100

(6)

No. 05-88

Supreme Court, U.S.
FILED
SEP 27 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CORNELIUS COOPER, *et al.*,

Petitioners,

v.

SOUTHERN COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF

W. CHRISTOPHER ARBERY
HUNTON & WILLIAMS
600 Peachtree Street, N.E.
Bank of America Plaza
Suite 4100
Atlanta, GA 30308-2216
(404) 888-4000

STEPHEN W. RIDDELL
Counsel of Record
T. WOOD LOVELL, JR.
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E.
Bank of America Plaza
Suite 5200
Atlanta, GA 30308-2216
(404) 885-3000

Counsel for Respondents

196952

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents' corporate disclosure statement was set forth at page *ii* of their Brief in Opposition, and there are no amendments to that statement.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6 i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

INTRODUCTION 1

REASONS FOR DENYING THE PETITION 2

I. The Eleventh Circuit Expressly Prohibits District Courts from Deciding the Merits of a Case at the Certification Stage 2

A. *Amici* Have Not Attempted to Demonstrate Any Compelling Reasons for this Court to Review the Lower Courts' Rigorous Analysis of Petitioners' Evidence 2

B. The Lower Courts' Rigorous Analysis of Petitioners' Evidence Is Mandated by this Court's Jurisprudence 3

II. *Amici* Make No Effort to Demonstrate "Compelling Reasons" for Reviewing the Denial of Certification of an Equitable Relief-Only Class 6

Contents

Page

A. Petitioners Have Never Identified a Discriminatory Policy or Specified the Injunctive Relief They Claim To Be Seeking 7

B. This Case is Readily Distinguishable from *Allen* 8

C. The Eleventh Circuit Does Not Employ a "Damned if You Do, Damned if You Don't" Rule 9

CONCLUSION 10

TABLE OF CITED AUTHORITIES

Page

Federal Cases

Allen v. Int'l Truck and Engine, 358 F.3d 469 (7th Cir. 2004) 8, 9

Bazemore v. Friday, 478 U.S. 385 (1986) 1

Bridgeport Guardians, Inc., 933 F.2d 1140 (2nd Cir. 1991) 7

Califano v. Yamasaki, 442 U.S. 682 (1979) 1

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 5

Desert Palace v. Costa, 539 U.S. 90 (2003) 1

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 2, 3, 4

Gariety v. Grant Thornton, LLP, 368 F.3d 356 (4th Cir. 2004) 6

General Telephone Company of the Southwest v. Falcon, 457 U.S. 147 (1982) 4

Grosz v. The Boeing Co., No. 04-55428, 2005 WL 1515070 (9th Cir. June 28, 2005) 7

Reed v. Arlington Hotel Co., Inc., 476 F.2d 721 (8th Cir. 1973) 7

Zapata v. IBP, Inc., 167 F.R.D. 147 (D. Kan 1996) ... 2

Cited Authorities

Page

Rules:

Fed. R. Civ. P. 23 ..... *passim*

Sup. Ct. R. 10 ..... 1, 3, 6

Sup. Ct. R. 37.1 1

INTRODUCTION

Respondents hereby file this Supplemental Brief in response to the Brief of *Amici Curiae* ("Amicus Brief") the Impact Fund, Asian Law Caucus, Inc., Asian Pacific American Legal Center, Employment Law Center, Equal Rights Advocates, and Public Advocates ("*Amici*"). *Amici* fail to present any "compelling reasons" for this Court to grant Petitioners' Petition for a Writ of *Certiorari* ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioners make no effort to demonstrate that the Eleventh Circuit's November 10, 2004 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Eleventh Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Instead, *Amici* merely attempt to establish that the District Court *should have* certified a class.[1] Such a showing — which, in any event, *Amici* have not made — falls far short of demonstrating that there are compelling reasons for the Petition to be granted or even that the District Court's denial of certification constitutes an abuse of discretion.[2] Accordingly, *Amici* have provided no "relevant matter not already brought to [this Court's] attention by the parties," and the Petition should be denied. *See* Sup. Ct. R. 37.1.

---

1. Tellingly, *Amici* do not appear in support of Petitioners' contentions that (i) the lower courts' analysis of Petitioners' expert report violates *Bazemore v. Friday*, 478 U.S. 385 (1986) or that (ii) this Court's decision in *Desert Palace v. Costa*, 539 U.S. 90 (2003) affects the outcome of this case.

2. The denial of class certification is reviewed under the highly deferential abuse-of-discretion standard. *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979).

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit Expressly Prohibits District Courts from Deciding the Merits of a Case at the Certification Stage

A. *Amici* Have Not Attempted to Demonstrate Any Compelling Reasons for this Court to Review the Lower Courts' Rigorous Analysis of Petitioners' Evidence[3]

At the outset of *Amici*'s argument, *Amici* broadly contend that "[c]*ertiorari* should be granted to clarify the standard for satisfaction of Rule 23 in Title VII class actions." (Amicus Brief at 9). Aside from this generalized, unsupported assertion, however, *Amici* make absolutely no effort to show that there is any need for clarification of the legal standards underlying Rule 23. (*See* Amicus Brief at 9-13). To the contrary, *Amici* themselves contend that the applicable Rule 23 standards are contained in the "*clear holding* of" *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). (*See* Amicus Brief at 13) (emphasis added). Likewise, Petitioners — who claim that the decisions below "flatly contradict[ ]" Rule 23 and *Eisen* — do not contend that the caselaw interpreting Rule 23 is unclear in any way. (Pet. App. at 7). In fact, the parties agree that *Eisen* prohibits district courts from deciding the

3. *Amici* devote a substantial portion of their Brief to a discussion about the benefits of class actions generally. (*See* Amicus Brief at 4-9). While Respondents do not dispute that the class action device is an important mechanism to vindicating civil rights, the availability of attorney's fees as well as compensatory and punitive damages under the Civil Rights Act of 1991 undermines *Amici*'s contention that "[w]ithout the benefit of class actions, the alternative will likely be no lawsuit at all." (*See* Pet. App. at 5); *see Zapata v. IBP, Inc.*, 167 F.R.D. 147, 163 (D. Kan. 1996) (rejecting plaintiffs' argument in putative class action that individual plaintiffs are unlikely to bring employment discrimination suits, because "Title VII provides for the allowance of attorneys' fees, which is strong incentive for attorneys to bring suit on behalf of individual plaintiffs").

merits of a case at the certification stage. Thus, it is readily apparent that the federal courts do not need clarification of the Rule 23 criteria.

In actuality, *Amici* are essentially attempting to challenge the *correctness* of the decisions below under the particular facts of this case. Specifically, *Amici* present the same argument advanced by Petitioners — *i.e.*, that the District Court violated this Court's decision in *Eisen* by deciding the merits of Petitioners' discrimination claims at the certification stage. (Amicus Brief at 11-13). This misguided strategy fails for the simple reason that such a showing (which, as discussed below, *Amici* have *not* made) would fall far short of satisfying this Court's heightened threshold for granting *certiorari*. *See* Sup. Ct. R. 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Instead, *Amici* have the burden of demonstrating that the decisions below (i) conflict with a decision of this Court or a Court of Appeals or (ii) implicate federal question that has not been decided by this Court. *See* Sup. Ct. R. 10(a)-(c). Even a cursory review of *Amici*'s Amicus Brief demonstrates that *Amici* have not even attempted to make either of these showings. Therefore, *Amici*'s Amicus Brief is of no assistance to this Court, and the Petition should be denied.

B. The Lower Courts' Rigorous Analysis of Petitioners' Evidence Is Mandated by this Court's Jurisprudence

In *Eisen*, this Court held that the district court erred by holding a preliminary hearing on the merits of the plaintiff's claims at the class certification stage, because "[n]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 177. *Amici* contend

that, "[c]ontrary to this Court's *Eisen* rule, the Eleventh Circuit's decision endorsed an analysis by the district court, which required the plaintiffs to prove liability in order to satisfy Rule 23."[4] (Amicus Brief at 11). *Amici*'s contention, however, ignores the Eleventh Circuit's directive in *this* case that "a trial court *may not properly reach the merits of a claim* when determining whether class certification in warranted . . ." (*See* Pet. App. 22a) (emphasis added). Clearly, the Eleventh Circuit does not endorse (and in fact it explicitly prohibits) merits inquiries at the certification stage.

Amici further claim that District Court erred when it "delved deeply into an analysis of the evidence." (Amicus Brief at 12). This assertion is belied by this Court's jurisprudence since *Eisen* was decided. Specifically, this Court has subsequently explained that district courts are *required* to conduct a "rigorous analysis" of the evidence to determine whether the plaintiffs have satisfied the elements of Rule 23(a). *See General Telephone Company of the Southwest v. Falcon* 457 U.S. 147, 161 (1982) ("a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied"). In this case, the District Court properly conducted a rigorous analysis of Petitioners' evidence for the sole purpose of determining whether Petitioners established commonality and typicality under Rule 23(a). (*See, e.g.*, Pet. App. at 327a ("it is important to focus on the relative strength and quality of [Petitioners'] evidence to determine if it is strong enough to provide the element of commonality needed for class certification"); Pet App. at 323a ("[p]laintiffs have made little effort to show what facts prove [typicality")). As the Eleventh Circuit recognized in light of *Falcon*, the "District Court would have erred if it had certified a class without first

4. The Eleventh Circuit expressly rejected the notion that the District Court decided the merits of Petitioners' claims. (Pet. App. at 22a-23a).

determining that the named plaintiffs had claims common to those of the unnamed class members." (Pet. App. at 23a).

Amici's additional contention that the courts below "relied" on the liability standard for pattern and practice claims is misleading. (*See* Amicus Brief at 11-12). In reality, the Courts merely recited this liability standard because they were compelled by Rule 23(a) to analyze whether Petitioners had claims in *common* with the putative class under Petitioners' pattern and practice theory. (*See* Pet. App. at 29a

> *Commonality* in the claims of the broad class the plaintiffs sought to certify would have to be established by showing that the discrimination sustained was either part of an overarching pattern and practice of intentional discrimination on the part of the defendants or the result of the discriminatory disparate impact of a facially neutral employment policy.

Pet. App. at 37a ("we conclude that the district court did not abuse its discretion in determining that the statistical and anecdotal evidence submitted by the plaintiffs did not establish pattern and practice discrimination *common* to the class or a *common* disparate impact affecting the defendants' African-American employees class-wide")) (emphasis added).

While some of this evidence naturally was intertwined with the evidence Petitioners would have used to prove the merits of their case, it was not an abuse of discretion for the lower courts to conduct a rigorous analysis of Petitioners' evidence. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) ("evaluation of many of the questions entering into determination of class action questions is *intimately involved with the merits of the claims*") (emphasis added). Indeed, this Court requires district courts to conduct the very analysis that was conducted by the lower courts in

this case. (*See* Pet. App. at 23a ("the district court was obliged to make some preliminary assessment of the plaintiffs' evidence to determine, at the very least, whether the named plaintiffs were claiming discrimination that was *common* to the members of the putative class"); *see Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) ("*Eisen*'s prohibition against assessing plaintiffs' likelihood of success on the merits as part of a Rule 23 certification does not mean that consideration of facts necessary to a Rule 23 determination is foreclosed merely because they are required to be proved as part of the merits"). Accordingly, this issue plainly does not warrant this Court's attention.

II. *Amici* Make No Effort to Demonstrate "Compelling Reasons" for Reviewing the Denial of Certification of an Equitable Relief-Only Class

As a threshold matter, *Amici* do not even attempt to show that the Eleventh Circuit's Opinion affirming the denial of certification of an equitable relief-only class conflicts with a decision of this Court or a Court of Appeals or implicates a federal question that has not been decided by this Court. (*See* Amicus Brief at 13-17); Sup. Ct. R. 10(a)-(c). In fact, *Amici* do not even claim that the District Court abused its discretion in declining to certify an equitable relief-only class. (*See* Amicus Brief at 13-17). Instead, *Amici* primarily attempt to identify supposed flaws in the lower courts' analysis, and *Amici* hypothesize about other possible alternatives that were supposedly available to the District Court. (*See id.*). Accordingly, *Amici* have not demonstrated any compelling reasons for this Court to grant the Petition. *See* Sup. Ct. R. 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

A. Petitioners Have Never Identified a Discriminatory Policy or Specified the Injunctive Relief They Claim To Be Seeking

Amici challenge the Eleventh Circuit's decision to affirm the denial of Petitioners' so-called "request" for certification of an equitable relief-only class.[5] (Amicus Brief at 15). Petitioners, however, *never actually dismissed their claims for compensatory and punitive damages*. Therefore, Petitioners' contention merely presents a hypothetical scenario that is not properly before this Court.

Amici, who completely disregard the fact that Petitioners never actually sought an injunctive relief-only class, emphasize that "courts have ordered defendants to change specific employment practices to remedy discrimination." (Amicus Brief at 8 (citing *see, e.g., Bridgeport Guardians, Inc.*, 933 F.2d 1140, 1142, 1149 (2nd Cir. 1991) (affirming injunction which mandated use of "banding" in connection with employment test that had disparate impact on minority candidates); *Reed v. Arlington Hotel Co., Inc.*, 476 F.2d 721, 723-24, 726 (8th Cir. 1973) (defendant ordered to alter discriminatory recruiting practices where certain departments were segregated entirely along racial lines))). Unlike the plaintiffs in the cases cited by *Amici* (who identified specific, discrete employment practices that could be enjoined), Petitioners have never identified any discriminatory policy or specified the injunctive relief they claim to be seeking. (Pet. App. at 370a ("Plaintiffs have given the Court little

5. There is no need for this Court to reach this issue because the District Court did not abuse its discretion in determining that Petitioners failed to satisfy the elements of Rule 23(a). *See* Fed. R. Civ. P. 23(b) (plaintiff must meet all four of the requirements of Rule 23(a) *and* at least one requirement of Rule 23(b)); *Grosz v. The Boeing Co.*, No. 04-55428, 2005 WL 1515070, *2 (9th Cir. June 28, 2005) ("[b]ecause we find that the requirements of Rule 23(a) are not met, we need not reach the question of whether the proposed class satisfies, in addition, one of the requirements of Rule 23(b)).

information as to what sort of injunctive or declaratory relief would be of such clear importance as to warrant a determination that equitable issues predominate over the issues of damages") Pet. App. at 40a n.13 ("the declaratory and injunctive relief plaintiffs seek amounts, in essence, to an order stating that the defendants discriminated against African-American employees, and enjoining them from discriminating in the future")). Indeed, Petitioners claimed at the certification stage that "Defendants' actual policy is 'no policy.'" (Pet. App. at 349a). For these reasons, as well as Petitioners' failure to satisfy the elements of Rule 23(a), the District Court did not abuse its discretion in declining to certify an equitable relief-only class.

B. This Case is Readily Distinguishable from *Allen*

Petitioners rely heavily on a recent Seventh Circuit decision in which that Court ordered certification of an equitable relief-only class. (Amicus Brief at 14-15 (citing *Allen v. Int'l Truck and Engine*, 358 F.3d 469 (7th Cir. 2004)). In *Allen*, the district court held that twenty-seven named plaintiffs — who sought to represent a class of 323 African-American employees working for a single company at a single plant — successfully established the elements of Rule 23(a). 358 F.3d at 471. Nevertheless, the district court declined to certify an equitable relief-only class on the ground that such a class would "result in confusion and be overly burdensome to the resources of the court system." *Id.*. The Seventh Circuit reversed and remanded for a jury trial, holding that a class proceeding for equitable relief would be "no more complex than [twenty-seven] individual trials."[6] *Id.* at 472.

---

6. Although the Seventh Circuit also determined that certification of an equitable relief-only class would not have violated the Seventh Amendment, *Amici* have made no effort to demonstrate that the District Court's consideration of concerns about Seventh Amendment issues (which were based on the unique facts of this case) constitute an abuse of discretion. (*See* Amicus Brief 13-17); *Allen*, 358 F.3d at 472.

The facts of this case are readily distinguishable from the facts in *Allen*. As an initial matter, while the named plaintiffs in *Allen* satisfied all four elements of Rule 23(a), Petitioners established only *one* of those four elements in this case (numerosity). *Id.* at 471; (Pet. App. at 324a-326a, 366a-367a). Further, the named plaintiffs in *Allen* sought to represent a class of 323 employees. In contrast, Petitioners purport to represent a class of *2,400* employees — more than seven times the number of class members than in *Allen*. (Pet. App. at 3a, 28a). In addition, whereas all of the employees in *Allen* worked for a single company at a single plant, the employees in the putative class in this case work for three different companies at more than 200 different locations in several states.[7] (R136 V.3 Tab 27: 9-28). Because of these significant factual differences, the Eleventh Circuit's Opinion can be read in harmony with the Seventh Circuit's decision in *Allen*, which has no bearing on the Petition whatsoever.

C. The Eleventh Circuit Does Not Employ a "Damned if You Do, Damned if You Don't" Rule

Finally, *Amici* contend that the Eleventh Circuit employs a "damned if you do, damned if you don't" rule that gives "victims of discrimination little choice but to forfeit the class treatment that may be their only realistic hope for enforcing their civil rights . . ." (Amicus Brief at 15). *Amici*, however, ignore the fact that Rule 23(b)(2) is not the only avenue for plaintiffs to pursue allegations of class-wide discrimination. In this case, Petitioners also sought unsuccessfully certification under Rule 23(b)(3) — yet neither Petitioners nor *Amici* contend that the District Court's denial of

---

7. Based on these facts, it was certainly within the District Court's considerable discretion to determine that "the prospect of trying possibly two thousand of these claims before a single jury is simply absurd." (Pet. App. at 372a).

certification under Rule 23(b)(3) was an abuse of discretion.[8] (*See* Pet. App. at 22-24, 372a; Amicus Brief at 13-17). Thus, this contention is unavailing.

CONCLUSION

Amici (like Petitioners) have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

W. CHRISTOPHER ARBERY
HUNTON & WILLIAMS
600 Peachtree Street, N.E.
Bank of America Plaza
Suite 4100
Atlanta, GA 30308-2216
(404) 888-4000

STEPHEN W. RIDDELL
Counsel of Record
T. WOOD LOVELL, JR.
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E.
Bank of America Plaza
Suite 5200
Atlanta, GA 30308-2216
(404) 885-3000

Counsel for Respondents

8. *Amici* also claim that "numerous circuits authorize the provision of notice and an opt-out rights in (b)(2) cases so that class members may pursue compensatory damages individually, if they wish to." This contention is immaterial because Petitioners have not claimed that the District Court abused its discretion by not certifying a class under Rule 23(b)(2) with opt-out rights. (*See* Pet. App. 1-30).